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A TREATISE

ON

THE LAW OF BANKS AND BANKING

VOL. I

A

TREATISE ON THE LAW

OF

BANKS AND BANKING

BY

JOHN T. MORSE, Jr.

Fifth Edition

REVISED AND ENLARGED

BY

JAMES N. CARTER, Ph.B., J.M.

Vol. I

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PREFACE

In preparing this edition the work of the revision has largely taken the form of bringing the citation of the cases to date and of adding illustrative notes, and in so doing about 3000 citations have been added. In the fourth edition the work was carefully revised throughout and it has met with such wide and unanimous approval of both the practising lawyer and the judge on the bench, and has been so constantly cited by the courts as the leading authority of the law of banks and banking that it, therefore, has been deemed advisable when adding new matter, to take as few liberties with the text as possible.

The parallel citations of cases in the National Reporter System, in the American State Reports, and in the Lawyers' Reports Annotated have been added to the ordinary method of citation, and after each citation has been added the year in which the case was decided.

The Federal Reserve Act, with a synopsis and an index separate and distinct from the general index and placed after it, has been inserted. This synopsis and index were prepared under the direction of the Federal Reserve Board and the editor wishes to acknowledge the courtesy of said Board in allowing their use.

All references throughout the book are to sections; those of Part II, upon National Banks, being preceded by II. The Second Part contains a table by means of which ready reference may be had to the portions of this book that concern any given section of the Revised Statutes of the United States. The cases that construe the words of a given section of the banking law may sometimes be found cited under that section, but *generally* may be found by turning to that section of Part II whose number is 200 plus the number of the said section of the banking law.

The analysis at the head of each chapter is intended as something more than an index. Wherever the treatment of a subject

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is expansive, great care has been taken to put an *accurate* and *compressed* statement of the law of that subject in the analysis. It will be found useful always to refer to the analysis as well as to the text in seeking the solution of the problem in banking law, for very often, by reason of their having been drafted from different points of view, they mutually elucidate each other; and the reference in the analysis to sections kindred in subject matter will also be found of value.

JAMES N. CARTER.

March, 1917.

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BANKS AND BANKING

CHAPTER I

PRELIMINARY

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State Bank and State statutes.

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(2) as to *powers* of bank *officers* and *agents*.
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(4) that a banker must know the signature of his customers.
(5) as to negotiability of paper.
(6) as to what constitutes delivery.
(For other examples of Usage, see Index, Usage.)

The essential principles in the matter of Usage are three.

(1) Contemplation.

The usages of a bank or group of banks, contemplated as a factor in the agreement at the time of contract, form a part of it. But if an institution or set of institutions not within the contemplation of the parties at the time of contracting as entering into the agreement, or having any part to perform in connection with it, the usages of such institution or institutions form no part of said contract. As regards the usages of a single bank, however, this principle must be received in connection with two others following.

(2) Adoption.

One who makes use of the facilities of a bank must be held by its usages, particular and general; he adopts the bank, usages, and all; he cannot expect to act otherwise than in its own accustomed manner, and, knowing that banks are apt to have their special methods of business, it is his own fault if he does not inquire into them before selecting the bank. One who voluntarily goes on board of a ship bound upon its usual course cannot complain if it does not take him to the port he wished; he should

have inquired of the proper authorities whither it was going.

(3) Adverse Position.

Where A. contracts with B., the usages of B. or of his agents cannot affect A., unless he has knowledge of them at the time of contract, or they are so general that A. must be presumed to know them. In respect to banks, the usages general among those of a particular locality are presumed, under this principle, to be known, but not the special usage of each single bank. So that, in any dealing between third parties, if the bank can be placed distinctly on one side of the agreement, its particular usages will not bind the other side unless known to it.

For example, when A. takes a check from B. upon the bank with which B. deals, B. is bound by the special usages of the bank, under principle (2), but A. is not, for to him (3) applies. So, if a note is payable at bank C., the usages of C. in collecting affect the maker, under (2); but if a note is drawn generally, not as payable at a particular bank, and the holder puts it in bank C. for collection, the holder is bound by the usages of C., particular as well as general, but the maker is only bound by the general usages, even though he knows the special usages; for although the group of banks in the place where the note was payable was contemplated as a probable factor in the collection, the special bank C. was not contemplated, and its peculiar usage did not enter the agreement at the time of contract.

In brief, if I employ a bank to act for me, or authorize you to employ it to act against me, I am bound by its usage, whether known to me or not.

But, in other cases, where I come in contact with the bank, merely because I have a demand against, or it has a demand against me, I will not be bound by its usage, unless at the time of entering into the contract from which the claim arises, (1) The bank was contemplated as a factor, and (2) I either knew its custom, or it is just to presume knowledge, because it was my duty to inquire; and this last question will always depend for its answer upon the facts of each new class of cases as they arise, and the judge's sense of what is fair and just under the circumstances and knowledge will not be presumed so as to take away the substance of valuable legal rights without actual consent, but only where the effect of the usage is confined to varying the formal law. § 223.

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(5) Capacity to contract.
(6) Form of contract.
(7) Place of performance governs the construction and validity of a contract.
Place of payment decides usually.
Seat of a continuous business governs the obligations of him who carries on the business arising in the course of the business.
Of two possible laws, that most favorable to the contract is applied.
Seat of a casual contract.
Place where a contract is made is its seat, when this is not otherwise determinable, and the place of *delivery*, not the place of *signing* or *dating*, is the place of making, except as to *bona fide* parties without notice.
The law governing bills and notes, liability of maker, drawer, indorser, acceptor, grace, demand, protest, notice.
(Note 7) Equity will compel a good contract to be made in some cases.
(Note 15) Interest may be governed by the law of
the place of payment.
the place of making the contract.
the place of using the money.
the place of suit as to interest recovered as damages.
In some States, the *Lex Fori* governs as to this kind of interest.

§ 1. **Scope of the Book.** — The subject of this volume is that portion of Substantive[1] Law which relates to Banks and Banking.

In its narrowest sense this would include only such part of the

[1] § 1. With procedure we have little to do except incidentally in the notes, the windows of the book through which we may look upon the world of law beyond its limits.

law as *owes its existence* to Banks and Banking. We should consider those combinations of fact in which a bank is an essential [2] element, and by comparing the consequences attached by the law to the facts in such cases, derive by induction the law peculiar to banking.

In its widest sense our subject would include all law *applicable* to banks, and we should have to note the legal consequences linked to every combination of circumstances into which a bank could enter as a factor.

While the first method would be the proper one if the book were part of a complete and connected treatment of the whole law, it would exclude very much that is of every-day use in banking, and of which a text-book intended to be used by itself should speak. Yet, if the book were written upon the second plan, it would be a cyclopædia of law. The sensible plan seems to be, to group in one volume the law peculiar to banks, and such further matter as is of *frequent* application in, or has a *very important* bearing upon, their business.

This we shall do, first defining our terms and noting the sources of banking law, then considering the law of Banks and Banking in general, and finally giving our attention in Part II. to the national banking laws and their construction.

Definitions

General definition of a Commercial Bank . . . . . § 2.
Definition of Savings Bank . . . . . § 3.
United States tax definition of a Bank . . . . . § 4.
State Banks and National Banks defined . . . . . § 5.
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General Definition of a Commercial Bank

§ 2. **A Bank** is an institution, usually incorporated, with power to issue its promissory notes intended to circulate as money (known as bank notes); or to receive the money of *others* [a] on general deposit (§ 288), to form a joint fund that shall be used

[2] Essential = necessary to the consequence; the cause or a part cause of the legal consequence belonging to the combination of facts into which it enters, in such sense that if it were absent, or replaced in the combination by any fact outside of banking, the consequence would not be the same.

by the institution for *its own benefit*, for one or more of the purposes (§ 46 A) of making temporary loans and discounts, of dealing in notes, foreign and domestic bills of exchange, coin, bullion, credits, and the remission of money; or with both these powers, and with the privileges, in addition to these basic powers,[0] of receiving special deposits, and making collections for the holders of negotiable paper, if the institution sees fit to engage in such business.[0a]

(Historically, receiving special deposits is the root of the banking business, but it is now of little importance compared with the great tree that looms against the sky of nineteenth-century civilization.)

a. "Others on deposit." A man using his own funds to discount business paper, or to buy exchange, is not a banker in any proper sense; nor is he any more a banker because he borrows money from another, and uses it in the same way; it is essential that there should be a place *where, as a regular business,* the money of others is received on general deposit. There must be a combination of moneys, a joint fund, as a primary condition of the existence of a bank or banker, or the transaction of a banking business.[0b]

Practically, a bank is a place where deposits are received and paid out on checks, and money is loaned on security.[0c] If the institution has the additional power of issuing its promissory notes to circulate as money, it is called a "bank of issue."

Generally, the bank must hold itself ready at any time to pay the amount of a deposit to a depositor or his order, but this may be varied by agreement, (as to give one or more days' notice, or not to draw for a certain time, or to leave always a certain sum to the depositor's credit,) and is not an essential to the definition.[0d]

[0] § 2. Dealing in notes, bills of exchange and credits. State *v.* Corning Savings Bank, 139 Ia. 338, 115 N. W. 937 (1908).

[0a] Dunn *v.* State, 13 Ga. App. 314, 79 S. E. 170 (1913); Hamilton National Bank *v.* American Loan etc. Co., 66 Neb. 67, 92 N. W. 189 (1902).

[0b] MacLaren *v.* State, 141 Wis. 577, 124 N. W. 667, 135 Am. St. Rep. 55 (1910).

[0c] But a foreign corporation which makes loans upon security of real estate and pledges its own stock is not a "banking corporation" under Oregon statutes. Pacific Building Co. *v.* Hill, 40 Or. 280, 67 Pac. 103, 56 L. R. A. 163 (1901).

[0d] State *v.* Franklin County Sav. etc. Co., 74 Vt. 246, 52 Atl. 1069 (1902).

But it is essential that the fund should be used in prosecuting some of the functions recognized by long usage, or by explicit statutory enactment, or both, as belonging to the business of banking. If simply used to make investments of other kinds, the depositary resembles a trustee or a speculator rather than a banker.

The definitions of the words Bank, Banker, and Banking, in Worcester's Dictionary, are too deficient in precision to be of any use for legal purposes. Those given by Webster are likewise certainly open to criticism.

Bouvier[0e] says, "A bank is an institute, generally incorporated, authorized to receive deposits of money, to lend money, and to issue promissory notes (usually known as bank notes), or to perform some one or more of these functions."

This is clearly faulty: an institution may have power to lend money and not be a bank; *e.g.* a partnership, or a loan and trust company.

United States General Definition

In Oulton *v.* Savings Institution,[1] Clifford, J. said: "Banks in the commercial sense are of three kinds, — of deposit, of discount, and of circulation. Originally the banking business consisted in *receiving deposits*, such as bullion, plate, and the like, for safe keeping, until the depositor should see fit to withdraw. Later, bankers began to *loan* by discounting bills and notes, or on mortgage, pawn, or other security. And, at a still later period, to issue notes of their own, intended to circulate as money instead of gold and silver. Modern banks frequently exercise any two, or even three, of those functions; but it is still true that an institution prohibited from exercising any more than one of them is a bank in the strictest sense."

Now this, as to the *second* function considered alone, is open to the same objection as Bouvier's definition, and the Judge's language is more sweeping than the case called for, as the question before him was whether an institution having the *first* power was a bank.[2]

[0e] See, however, Bouvier, Third Revision.

[1] Oulton *v.* Savings Institution, 17 Wall. 109–118, 21 L. ed. 618. See Dunn *v.* State, 13 Ga. App. 314, 79 S. E. 170 (1913); American National Bank *v.* Morey, 113 Ky. 857, 69 S. W. 759, 101 Am. St. Rep. 379, 58 L. R. A. 956 (1902); MacLaren *v.* State, 141 Wis. 577, 124 N. W. 667, 135 Am. St. Rep. 55 (1910).

[2] A loan association organized under special charter with power to re-

§ 3. **A Savings Bank** [1] is an institution in the nature of a bank, but differing as follows: —

First. The fund formed by the deposits is not used in discounting and loaning on personal security, etc., except to a limited amount to the depositors, or as a means of investing surplus moneys, but in mortgages, bonds, and stocks, designated in the statute [2] under which the bank is organized.

Second, and chiefly. The *deposits must be invested for the*

ceive deposits, loan money, discount notes, etc., is a corporation, within § 12 of the Illinois Banking Act. Henderson Loan Association *v.* People, 163 Ill. 196, 45 N. E. 141. But see Nash *v.* Brown, 165 Mass. 384, 43 N. E. 180; *In re* Purl, 147 Mo. App. 105, 125 S. W. 849 (1910).

To buy and sell commercial paper, to make and negotiate loans, to receive money to be transferred to and paid at other places, to buy and sell exchange upon other cities in this and foreign countries, to receive money on deposit, and to pay the same out upon checks or orders, are each banking functions, and a corporation which exercises many if not all of these is a bank within the meaning of Sec. 7, Art. 11 *b* of the Nebraska Constitution. Hamilton National Bank *v.* American Loan etc. Co., 66 Neb. 67, 92 N. W. 189 (1902). One engaged in the business carried on by banks of deposit *or* of discount *or* of circulation is doing a banking business. So a department store which maintains a "deposit" purchase department where persons may make deposits, bearing interest against the amount of which the depositor may purchase goods, or which he may withdraw at any time in cash, is doing a banking business. MacLaren *v.* State, 141 Wis. 577, 124 N. W. 667, 135 Am. St. Rep. 35 (1910). But when a priest who is the treasurer of a church makes a practice of borrowing small sums from his parishioners and giving the church's notes therefore bearing interest, the church is not doing a banking business. Martin *v.* St. Aloysius Church, 38 R. I. 339, 95 Atl. 768 (1915). See also on the definition of banking, Davis *v.* West, 127 Ga. 407, 56 S. E. 403 (1907); Commercial National Bank *v.* First National Bank, 97 Tex. 536, 80 S. W. 601, 104 Am. St. Rep. 879 (1904); Weed *v.* Berge, 141 Wis. 569, 124 N. W. 664, 25 L. R. A. (N. S.) 1217 (1910); Chase etc. Co. *v.* National Trust etc. Co., 215 Fed. 633 (1914).

[1] § 3. See Huntington *v.* Savings Bank, 96 U. S. 388, 24 L. ed. 777. "A savings bank is defined to be an institution in the nature of a bank, formed or established for the purpose of receiving deposits of money for the benefit of the persons depositing, to accumulate the produce of so much thereof as shall not be required by the depositors, their executors or administrators, at compound interest, and to return the whole or any part of such deposit, and the produce thereof, to the depositors, their executors or administrators, — deducting out of such produce so much as shall be required for the necessary expenses attending the management of such institution, but deriving no benefit whatever from any such deposit or the produce thereof." Grant on Banking, 4th ed., 262. See Barrett *v.* Bloomfield Sav. Inst., 64 N. J. Eq. 425, 54 Atl. 543 (1903), affirmed in 66 N. J. Eq. 431, 57 Atl. 1131. See Bank Commissioners *v.* Watertown Savings Bank, 81 Conn. 261, 70 Atl. 1038 (1908); Colorado Savings Bank *v.* Evans, 12 Colo. App. 334, 56 Pac. 981.

[2] See for Massachusetts law, R. L. c. 113, § 26.

benefit, not of the bank, but *of the depositors;* this is the cardinal distinction. Money deposited in a bank, unless agreed to the contrary, becomes the property of the bank, to be used for its profit, and if lost it is the bank's loss; but money deposited in a savings bank remains the property of the depositor, and the increase is his, the bank having no claim except for the expense of management, and if lost it is the depositor's loss,[3] unless occasioned by the negligence of the bank.

Third. A bank pays out deposits on checks, while the usual method with savings institutions is to pay only to the person producing the pass-book.

Whether a bank is actually a savings bank or not must be determined, not by its name, but by considering if its charter [4] gives it the characteristics above, the second being essential. A savings bank is simply a trustee; all moneys received under the charter are trust moneys, and the depositors stand in the same relation to the bank as the stockholders of an ordinary bank. This fact is of cardinal import in cases of insolvency.[5]

§ 4. **United States Definition for Purposes of Taxation. R. S. 3407.** — In 1866, the Congress of the United States thus defined a bank or banker: —

"Every incorporated or other bank, and every person, firm, or company having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds,[3] bullion, bills of exchange, or promissory notes are received for discount or for sale, shall be regarded as a bank or banker."

This enactment does away with the necessity of a joint stock, and of the combination of funds through the medium of general deposits. It would in most cases render private money-lenders bankers. Its intent, however, is not to have this force generally, but only for the specific and narrow purpose of taxation. Every money-making occupation is to be taxed; a few broad lines are drawn, and the whole community is marshalled into the various

[3] Osborn *v.* Byrne, 43 Conn. 155.

[4] That any one whose deposit reaches $100 may at his option have it converted into stock, does not prove the institution a savings bank. State *v.* Lincoln Savings Bank, 14 Lea (Tenn.) 42.

[5] Stockton *v.* Mechanics etc. Bank, 32 N. J. Eq. 163.

areas by means of this and similar imperative definitions. The act does not say a private money-lender is a banker, but simply that he shall be taxed as such; probably for the reason that his business is more nearly akin to banking than to anything else. But for purposes of strict legal construction, in all questions arising beyond the control of the provisions of this act, these arbitrary boundary lines are valueless. A private money-lender could not have been taxed as a banker in the absence of this express legislation; and it was to remedy this that the legislation was deemed necessary.

In construing this statute, the Supreme Court of the United States adopt the definition of a banker therein given (Act 1864, § 79), and say generally: "Having a place of business where deposits are received and paid out on checks, and where money is loaned upon security, is the substance of the business of a banker." [1] It will be observed that the statute uses the disjunctive and the court the conjunctive particle. The statute says: "Where credits are opened by deposit . . . *or* where money is advanced", etc. The court speak of the depositing "*and*" loaning. For all general purposes, beyond the artificial influence of the act, the court is clearly the more correct.

R. S. 3407 applies to a Chicago branch of a Canada bank,[2] but not to a corporation whose business is confined to investment of its capital in bonds secured by mortgage on real estate, and to negotiation, sale, and guaranty of them.[3]

§ 5. **State and National Banks.** — A State Bank is one organized under State law, or a charter granted by a State legislature, and derives its power from State sovereignty.

A National Bank is one organized under the national banking laws, and derives its existence and powers from the Federal sovereignty.[1]

[1] § 4. Warren *v.* Shook, 91 U. S. 704, 23 L. ed. 421.

[2] United States *v.* Bank of Montreal, 21 Fed. 236.

[3] The company did not receive deposits of money to be paid or remitted on draft or check, nor make discounts, nor issue notes (clause 1); nor does it come under clause 2, for the loan is really on the mortgage of real estate, and the bond is only evidence of the debt; nor under clause 3, for not those who keep their *own* stocks and bonds for sale are bankers (if so nearly all companies are), but those receiving bonds, stock, or bills *belonging to others*, for discount or sale, the company being only the agent of the owner, while in this case when the company took the bonds they became its property. It could sell or not; if it sold, it sold its own, and not another's, as a bank does. Selden *v.* Equitable Trust Co., 94 U. S. 419, 24 L. ed. 249.

[1] § 5. "**Regularly organized bank**", as used in a city ordinance, con-

Sources of the Law of our Subject

§ 6. **The Charter,**[1] or act of incorporation, or the general law under which the bank is organized, so far as valid,[2] is its supreme law,[3] within which it is secure, beyond [4] which it cannot go.

templates a bank organized under State law, or an act of Congress, but not a private bank owned by an individual. City of Du Quoin *v.* Kelly, 176 Ill. 218, 52 N. E. 919.

A "**chartered bank**" under Georgia law is a corporation clothed with the powers usually exercised by banking institutions. Dunn *v.* State, 13 Ga. App. 314, 79 S. E. 170 (1913).

[1] § 6. This word is often used as equivalent to "organic law", though the bank may be organized under a general statute.

The articles of association of a national bank, which specify the objects of the association, and may contain any provisions for the conduct of its business that are not inconsistent with law, when signed by the persons forming the company, and approved by the comptroller, are in the nature of a charter.

[2] It is invalid if it conflicts with the United States Constitution (as it *may* do by infringing on former grants to others), or with the laws of Congress valid under it, or if it is beyond the powers of the granting sovereignty under the State constitution; or if it is in derogation of the essential powers of future legislatures, as those of police regulation, eminent domain, and perhaps the power to tax.

Eminent Domain. The right of a State to take the property of a citizen when necessary for public use, on payment of its value, is inherent in sovereignty, and no legislature can take it out of the people, or give it away. 3 Parsons on Contracts, 8th ed. * 539.

Police Regulation and Taxation. The best opinion is, that the power of taxation is an essential, and that no legislature has power to surrender or limit it so as to control or abridge future legislation under it. The legislature may exercise the power of taxing or not, but cannot give it away. Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 69; Debolt *v.* Ohio Life Ins. & Trust Co., 1 Ohio St. 563.

The Federal doctrine is, "the relinquishment of such a power is never to be assumed. We will not say a State may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist." Providence Bank *v.* Billings, 4 Peters 561, 7 L. ed. 956.

And in State of New Jersey *v.* Wilson, 7 Cranch 164, 3 L. ed. 303, an agreement that the lands "shall not hereafter be subject to any tax" was held valid; but the right of the legislature to exempt from taxation so as to bind succeeding legislatures was not raised, and is not relevant to the case, for the transaction was in the nature of a *treaty* with the Indians, rather than a contract between a State and its citizens.

[3] See Central R., etc. Co. *v.* Farmers' L. & T. Co., 114 Fed. 263 (1902); State *v.* Bankers' Trust Co., 157 Mo. App. 557, 138 S. W. 669 (1911); Sturdevant *v.* Farmers' etc. Bank, 69 Neb. 220, 95 N. W. 819 (1903); Gause *v.* Commonwealth Trust Co., 196 N. Y. 134, 89 N. E. 476, 24 L. R. A. (N. S.) 967 (1909); State *v.* German Sav. Bank, 103 Md. 196, 63 Atl. 481 (1906); Arkansas Valley etc. R. Co. *v.* Farmer's etc. Bank, 21 Okla. 322, 96 Pac. 765, 129 Am. St. Rep. 782 (1908). Unless there is an express reservation of the right in the charter, or in general statute existing

§ 7. **Statute Law,** so far as not inconsistent with valid [1] charter rights, controls the bank.[1a]

State Banks are absolutely subject to all applicable laws of Congress valid under the Constitution, even though passed after the charter was granted; the State and all its acts are controlled by such laws, and charter rights are valid only when in accord with them. But a State may grant charter rights inconsistent with its *own* existing statutes, or may pass laws subsequent to the charter and conflicting with it; in these cases subject to the above limitations,[1] the State statutes must give way to the charter.

National Banks are the creatures of the National Banking Act, which may be amended, altered, or repealed at any time. They are under the entire control of Congress, and their rights cannot be determined by State legislation, except where Congress has so ordered,[2] or allowed.[3]

at the time the charter is granted (and therefore applying to it unless the charter is expressly put out of its control), the legislature cannot, without consent of the bank, repeal or modify the rights and franchises granted, except in the way of police regulation, eminent domain, or other power inherent in the nature of government, which are really not exceptions, but the boundary lines of the rights granted, implied reservations in every contract made by the State; *e.g.* if a bank has charter power to sell and transfer negotiable paper, a law taking away this power is void, as impairing the obligation of contracts. Planters' Bank *v.* Sharp, 6 How. 301, 12 L. ed. 447; Claghorn *v.* Cullen, 13 Pa. St. 133; People *v.* Manhattan Co., 9 Wend. (N. Y.) 351.

But Mechanics and Traders' Bank *v.* Debolt, 1 Ohio St. 591, holds that a charter is *not a contract*, but a *law* subject to amendment and repeal, and that a bank is a public institution, appointed solely for public uses, and subject to public control by enlargement or limitation of its powers and duties, or withdrawing its franchise entirely. This, of course, will not weigh against the decisions of the United States Supreme Court on this question arising under the Constitution. See § 10.

[4] A corporation is a creature of the law, and possesses only those properties which the charter of its creation confers upon it. Marshall, C. J., in Trustees of Dartmouth College *v.* Woodward, 4 Wheat. 636, 4 L. ed. 659.

National Banks have no powers except such as are given them expressly or by necessary implication by the acts of Congress passed in relation to that subject. Hansford *v.* National Bank, 10 Ga. App. 270, 73 S. E. 405 (1911), citing Logan County National Bank *v.* Townsend, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. 496.

[1] § 7. See § 6, notes.

[1a] The statute should be strictly construed. Commercial Banking etc. Co. *v.* Citizens' Trust etc. Co., 153 Ky. 566, 156 S. W. 160, 1915 C. Ann. Cas. 166, n., 45 L. R. A. (N. S.) 950. A state bank cannot establish a branch bank unless authorized by statute. Brunner *v.* Citizens' Bank, 134 Ky. 283, 120 S. W. 345 (1909).

[2] See as to interest, Part II. § 30.

[3] *E.g.* Congress could prohibit the States from taxing national banks,

§ 8. **The Common Law** supplies the law we seek, where not superseded by charter or statute. Especially do the principles relating to Usage, Conflict of Laws, Principal and Agent, and Contracts in general, concern us.[1]

§ 9. **A Usage** [1] that is applicable,[2] known [3] actually or construc-

but if it does not exert this power they are not exempt. See Part II. § 41. If a State could bind national banks *further* than above, it could legislate them out of existence, as by a discriminating tax, making State law supreme, instead of Federal law, as the Constitution provides.

[1] § 8. The principles of Contract and Agency are so woven into the very tissue of banking law that to state them as preliminary would be almost to make banking law preliminary to itself, but Usage and Conflict can with great advantage to clearness be dwelt upon slightly before passing to the main subject.

[1] § 9. (*a*) The Louisiana Code defines customs as follows: "Customs result from a long series of actions constantly repeated, which have by such repetition, and by uninterrupted acquiescence, acquired the force of a tacit and common consent." Art. 3, ch. 1.

(*b*) *Proof.* The proof of a usage must be by instances, not opinion, and generally one witness is not enough; several should testify to what is, by their observation, the uniform manner among themselves and others.

Usage proved by Parol Testimony. — The custom or usage of banks generally, or of an individual bank, may be sufficiently proved by parol testimony. Renner *v.* Bank of Columbia, 9 Wheat. 587, 6 L. ed. 166; Mills *v.* Bank of United States, 11 *id.*, 431, 6 L. ed. 512. Indeed, in a large proportion of the cases cited in this chapter, parol evidence has been admitted without objection. It is not necessary that the witnesses who are relied upon should be experts in the banking business, or in any manner engaged in the same, or connected with any bank whose individual usage is to be shown. If they have had any dealings which have brought the custom or usage within their observation and cognizance, so that they actually know it as a matter of fact, they are competent to testify to it, and it may be established by their testimony alone. Griffin *v.* Rice, 1 Hilt. (N. Y.) 184.

It is a question for the jury how uniform, how long, where, when, between whom, and if actually known.

For the court, whether given facts established a custom, and whether it is reasonable and not contrary to law, or to expressed intent of parties, see note 5.

Change of usage is proper, if not arbitrary. Changing a usage is creating a new one, and is governed by the same rules.

(*c*) Usage having been once found and sanctioned by the courts, evidence to disprove its existence becomes thereafter inadmissible. But this refers only to its existence at that time at which the decision found the fact of its existence. For a usage is sustained by the court, not because it is in itself law, but generally in spite of the fact that in itself it is not law, and because it is the uniform practice of the community which the judiciary from motives of policy will refrain from interfering with. But if at any time it ceases to become the practice of the community, it will no longer be judicially recognized as binding. For all transactions occurring during the period that it remained unchanged it must always be law, but transactions occurring after the change will not be affected by it.

Evidence of the fact of a change is therefore admissible to show that the previous decisions have ceased to be controlling precedents, and to indicate the true rule. Cookendorfer *v.* Preston, 4 How. 317, 11 L. ed. 992.

Arbitrary Alteration by a Bank of its Usages or Rules.

The law favors foresight, and one who acts on the basis of uniformity in the past (the only foundation for foresight), shall not be prejudiced by a sudden change of usage of which he has no notice, unless the uniform acts were merely courtesies. A hundred gifts build no right to another.

A bank cannot, by an arbitrary change in any of its rules or usages, injuriously affect the rights or interests of any dealer with it, who has previously had knowledge of such rules and usages, without bringing home to him positive notice of the change. Until he has been sufficiently notified to the contrary, he has the right to expect the ordinary course of dealing to be continued. Barnes *v.* Ontario Bank, 19 N. Y. 152; Cumming *v.* Shand, 5 Hurl. & N. 95, 29 L. J. Exch. 129. But to enable the customer to take advantage of this doctrine, he must show that the alteration has taken place in an actual rule or *bona fide* usage, in the legal sense of the latter phrase, of the bank. The usage need not be a *general* usage of the bank; it may be one which is only good as between himself and the bank. For usages of this limited nature may exist, and a bank, by its course of dealing with a single customer, may assume special obligations towards him individually which do not bind it as towards anybody else. Hotchkiss *v.* Artisans' Bank, 42 Barb. (N. Y.) 517.

In the cited case of Cumming *v.* Shand, the bankers had taken up certain bills for a customer upon the security of the proceeds to be expected from certain consignments; at the same time, they had been accustomed to let him continue his drafts upon his deposit account, or account current, with them. It appearing that this was the established course of dealing between them and this customer, it was held that they could not suddenly, without express notice to him, interfere with this course, charge him with the amount of advances before the proceeds from the consignments could be realized, and so cause his account to appear overdrawn.

But it must be supposed that there is a difference between an established course of dealing of such a character that the customer is entitled to demand its continuance until due notice has been given him of an intention to discontinue, and a mere gratuitous habit on the part of the bank to allow privileges or favors of such a character that the customer ought to be aware that they are concessions purely voluntary, and revocable at any time, at the bank's convenience and option. In other words, there is a distinction between a usage involving an implied agreement, and a habit of frequently extending a courtesy or favor altogether without consideration.

It is of course impossible to draw an accurate line of demarcation between the usages of the former class and the habits which fall within the latter description. In each instance the appropriate character will be conferred by a combination of all the many minute circumstances which can be adduced to interpret the true nature of the transactions.

[2] Pertaining to the business, relating to the transaction. A usage of weavers is not applicable to banking, nor does a usage in banking to do an act for one purpose apply to sustain doing the act for a different purpose. To the nicety of organization of which banking admits is due the great strictness and accuracy with which banking customs must be proved, and will be construed. So far from its being permissible to make the slightest approach to a generalization or to an argument from the closest of analogies, the tendency of the courts has been to trim the usage to its very narrowest proportions, and to require the most perfect

tively, certain,[4] uniform,[5] established, continuous,[6] peacable,[7] reason-

adaptation of the facts of the case to these. That two acts are essentially dependent for their lawful exercise upon power of precisely the same description, that one is a natural corollary of the other, that one is conveniently exercised in conjunction with the other, will not suffice to authorize the doing of the second when the right to do the first is dependent upon a custom. Even power to do a certain act arising from a custom to do it for a particular purpose or under particular circumstances, does not imply or include power to do the same act for a very slightly different purpose or under very slightly different circumstances. Supporting an act upon proof of a banking usage is a matter of very delicate and minute accuracy. Mussey *v.* Eagle Bank, 9 Met. (Mass.) 306.

[3] *As in Favor of one Ignorant.* No one can take advantage of a usage of which he was ignorant at the time of contract, for he did not contract in reference to it. Fowler *v.* Pickering, 119 Mass. 33; Nonotuck Silk Co. *v.* Fair, 112 Mass. 354. But this of course cannot apply to usage that has become fixed as a part of the common law, and it may be doubted if it can apply without limitation to other usages; for if D. employs a banker or physician, and injury results by reason of neglect of customary precautions, D. could surely take advantage of the usage indirectly as bearing on the question of negligence.

Against one Ignorant. One who actually knows of a particular bank's usages, and is reasonably aware that the bank will be a factor in the transaction, is bound by them; but one who is in fact ignorant will not be bound by a usage peculiar to the bank, unless he employs the bank to act for him, though, as to a usage general to the banks of a given city, every one who enters into a transaction which involves a dealing with or through the banks of that place is held to have notice; if he is in fact ignorant of it, and loses thereby, it is his own loss, and he can hold the bank to the same, and will not be affected disadvantageously by a different special custom of a particular bank, unless he employs that bank or actually knows its habit. Of course no one can allege ignorance of usage that has become law.

The law presumes knowledge of ancient, general, widely known usage. Loud *v.* Hall, 106 Mass. 404; Ober *v.* Carson, 62 Mo. 209. A person entering into a contract is not bound by the usage of a particular business, unless he actually knew of it, or it is so general as to furnish a presumption of knowledge. Stevens *v.* Reeves, 9 Pick. (Mass.) 198.

A usage of the factories of a neighborhood, that all employed shall be held to work a fortnight after they give notice of intent to quit, does not bind one who did not know of the custom. "The usage is a particular one, and not a general custom, and it should have appeared that the defendant knew of the usage when he entered on the work, or before he left it. It is so with the usage of banks, and all other usages not of so general a nature as to furnish a presumption of knowledge." Parker, C. J., in Stevens *v.* Reeves, 9 Pick. (Mass.) 198.

[4] Not vague and indefinite. Oelricks *v.* Ford, 23 How. 49, 16 L. ed. 534; Bassett *v.* Lederer, 1 Hun (N. Y.) 274. A usage to return goods sent for inspection, some saying within three days, others within a week or a month, is not certain and uniform enough to be binding. Wood *v.* Wood, 1 Car. & P. 59.

[5] Not fluctuating and occasional. Cope *v.* Dodd, 13 Pa. St. 33; United States *v.* Buchanan, 8 How. 83, 102, 12 L. ed. 997.

What lapse of time, or how many instances actually occurring, are

able,[8] not contrary to enacted law,[9] nor well-settled principles of mo-

requisite to establish a custom, is one of those questions attended with such an intrinsic and essential indefiniteness as prevents the possibility of any accurate answer. Certainly a usage must have a beginning. But, in its early stages, it is no more a complete usage in the eye of the law, having the legal attributes thereof, than a boy in his nonage is a man, having the legal rights of a man. Twenty-one years is the arbitrary limit which distinguishes the legal infant from the legal man. But no number, either of years or of recurrent acts and instances, can be arbitrarily set to mark accurately the transition period when the usage ceases to be embryonic and becomes perfect. The understanding, arrangement, or directions of bank officers, that a certain method shall thereafter be observed as the usage of the bank for the transaction of a certain class of acts, does not render this method a legal usage of the bank as towards any outside party, until time and practice shall suffice to give it that character which it does not and cannot derive from the intention of the officials. But time and practice bring in their train acquiescence and notoriety, and from these the law will draw the inference of knowledge on the part of the public, if the usage is that of the banks generally; or on the part of the parties dealing with the bank, if the usage is that of an individual bank only. Especially, if the custom is in derogation of the common law, a short time and a few instances of practice under it will be insufficient to obtain its recognition. Duvall *v.* Farmers' Bank, 9 Gill & J. (Md.) 31; Adams *v.* Otterback, 15 How. 539, 14 L. ed. 805. But a single instance of practice under a usage, though it would be utterly worthless to establish the fact of the custom, is yet amply sufficient to bring home notice of the existence of an already established custom to the persons dealing with the bank and having knowledge of such single instance. Dorchester & Milton Bank *v.* New England Bank, 1 Cush. (Mass.) 177.

[6] See note 5.

[7] A custom must be generally acquiesced in (not disputed at law or otherwise) by persons acting within the scope of its operations. Where it is the subject of contention, and only submitted to under protest, and to avoid litigation, it does not have that basis of common consent upon which the authority of usage is built. Arthur *v.* Bokenham, 11 Mod. 161; Strong *v.* Grand Trunk R. Co., 15 Mich. 206; McMasters *v.* Pennsylvania R. Co., 69 Pa. St. 374; Dixon *v.* Dunham, 14 Ill. 324. But though a usage must be *generally* assented to, as well as asserted, it need not receive universal consent. Desha *v.* Holland, 12 Ala. 513. There must be opposition before or at the time of the transaction, and not merely the subsequent denial of the defendant, to break the current of acquiescence.

[8] A custom must be reasonable, which is not the case if it is such as honest and right-minded men would deem unfair and unrighteous; as to put all the good berries on top, and bad at the bottom, or to charge the original cost of articles used at a funeral, though the same may be used at other funerals. Paxton *v.* Courtnay, 2 Fost. & Fin. 131. General usage is strong proof of reasonableness. Prudent men would not otherwise continue it, or allow others to, without protest. A custom of banks to honor occasional overdrafts of customers whose standing is good is reasonable. Lancaster Bank *v.* Woodward, 18 Pa. St. 357. And so a usage not to rectify mistakes unless discovered before leaving the room. Gallatin *v.* Bradford, 1 Bibb (Ky.) 209. And so a custom to appoint discount and examining committees to attend to the details and management of the business. Stone *v.* Rottman, 183 Mo. 552, 82 S. W. 76 (1904). It is not a

reasonable usage to send a draft (which the bank has for collection) to the drawee, to collect for himself. Chapman, C. J., Whitney *v.* Esson, 99 Mass. 308. Nor can a local custom give validity to a forged check. Morris *v.* Beaumont National Bank, 37 Tex. Civ. App. 97, 83 S. W. 36 (1904).

[9] A usage must not be contrary to enacted law, morality, religion, or settled principles of justice and public policy; but portions of the common law that are not founded on justice and policy directly, but are formal, and originated in usage and convenience, may be changed by usage.

No custom can influence the construction of a contract, or vary the rights of parties, if the custom is *illegal*, as if it is contrary to religion, morality, or public policy; Barnard *v.* Kellogg, 10 Wall. 383, 390, 19 L. ed. 987; Collender *v.* Dinsmore, 55 N. Y. 200–208; or if it is opposed to a well-settled rule of law; Greene *v.* Tyler, 39 Pa. St. 361; as if the words have received a judicial interpretation, it is not competent to show a contrary meaning by usage. So a usage for a factor to pledge generally his principal's goods is bad, as opposed to settled law. Newbold *v.* Wright, 4 Rawle (Pa.) 195. So a usage to take usurious interest is bad. Greene *v.* Tyler, 39 Pa. St. 361. So where a bank posted a notice that all indorsers of notes to it would be required to waive demand and notice, and D., for several years a customer of the bank, indorsed to it without any waiver written on the note, it was *held* that parol evidence of the usage of the bank and assent of the indorser could not be received to change the settled rule of law on the indorsement. Piscataqua Exchange Bank *v.* Carter, 20 N. H. 246.

Usage cannot be shown to absolve a bank from a positive and essential duty. The omission of any material portion of a transaction which it undertakes to perform cannot be excused on the ground of a custom to omit such portion. What the bank undertakes to do, it must do; it is only the manner of the doing, not the doing itself, that can be the proper subject of a custom. Borup *v.* Nininger, 5 Minn. 523.

No act which practically amounts to a wrongful appropriation or an improper use of the corporate funds can be sanctioned by a usage. Thus, a usage to honor the occasional overdrafts of customers, whose general standing and repute is good, is bad at law. Proof of such a usage will not protect the corporation, or any of its officers concerned in the transaction, from the natural and ordinary results of its wrongfulness. Lancaster Bank *v.* Woodward, 18 Pa. St. 357.

Laws regulating legal tender cannot be affected by any local usages to disregard them prevailing among banking houses. Marine Bank Cases, 27 Ill. 525; 28 *id.*, 90, 463; 29 *id.*, 248.

It is a matter of ordinary occurrence for persons using printed blanks for checks to cancel some portion of the printed matter which does not suit their temporary convenience; and banks are wont to disregard the fact of such cancellation as matter of suspicion, and to assume that it was done by the proper and authorized person. But the banks do this at their peril, and are not to be saved from a consequent loss simply because they can show a custom on their part to regard erasures of printed matter as no evidence of unauthorized alteration, when the same erasure of written matter would be so. Such a custom, said the court in Connecticut, has not existed so long, or become so general, as to be a part of the law merchant, and no person will be affected by it unless he be positively shown to have had knowledge of such a usage on the part of the bank and to have acquiesced in it. Mahaiwe Bank *v.* Douglass, 31 Conn. 170. The habit is certainly somewhat older now than it was when that decision was rendered; but mere age will hardly give it authority in the courts. It is

a usage containing intrinsic objections, which may very probably prevent it from ever receiving recognition except upon proof of direct assent to it by the parties concerned.

Usage contrary to statute. It is a general principle, that no custom among banks, however universal, or long established, or uniform it may appear to be, can give validity to any transaction upon their part which conflicts with a positive statutory enactment. But though the doctrine in this shape is clearly sound, it has been thus far illustrated only by cases arising under the usury laws. Banks have often sought to evade the restrictions of these laws under cover of a customary course of dealing. But all such efforts at evasion have thus far been rigorously defeated by the courts. Niagara County Bank *v.* Baker, 15 Ohio St. 68; Protection Ins. Co. *v.* Harmer, 2 *id.*, 452; New York Firemen's Ins. Co. *v.* Ely, 2 Cow. (N. Y.) 707; Dunham *v.* Gould, 16 Johns. (N. Y.) 367, per Chancellor Kent. An apparent exception to this statement might be supposed to be found in the custom of banks, when discounting, to deduct the interest *in advance*, thereby securing to themselves interest upon this interest for the period for which the discounted paper runs, and so actually receiving a fraction of one per cent more than the regular rate. But this should be regarded rather as an express power conferred by charter or organic law, than as an exception based solely upon usage. Power "to discount" is usually in terms given in all such charters and laws. If not given, it must be regarded as one of the essential elements of the banking business, which must be enjoyed by every banking institution by virtue of its general character and the objects for which it exists. Now "discounting" means a loan of money upon business paper where the interest is thus "counted off" or deducted beforehand; the deduction in this shape is a part of the definition of the word, an essential element in the transaction itself. Fleckner *v.* Bank of the United States, 8 Wheat. 338, 5 L. ed. 631; Niagara County Bank *v.* Baker, 15 Ohio St. 69; Farmers & Mechanics' Bank *v.* Baldwin, 23 Minn. 198. A corporation therefore entitled to conduct the general business of banking, *a fortiori* a corporation especially empowered "to discount," has legislative authority to compute interest in this peculiar manner. The habit of doing so must unquestionably, in its origin in time past, have been recognized as a usage. But since then it has come to be an inherent part of the transaction of discounting, and whenever discounting is done under legislative permission, this computation may be made by virtue of the same permission and as part thereof. The exception to the usury laws is not, therefore, based on the solitary fact of a usage, but of a usage incorporated into and sanctioned by legislative enactment, and it is the latter, not the former, ground that must be relied upon as really authorizing the taking of usurious interest. McLean *v.* Lafayette Bank, 3 McLean 587.

Usage contrary to morality. Customs must be moral; a usage of "bundling," *i.e.* for those courting to sleep together, will not excuse connivance of a father in an action by him for his daughter's seduction. Seagar *v.* Sligerland, 2 Caines (N. Y.), 219.

Usages against legal rules rejected: —

1. The rule that negotiable paper not payable on demand is entitled to grace, otherwise not; a usage in opposition to this would overturn the whole law as to bills of exchange. Woodruff *v.* Merchants' Bank, 25 Wend. (N. Y.) 673.

2. The rule that bank must pay depositor an equal sum in good money. Willetts *v.* Paine, 43 Ill. 433.

3. The rule that, where the holder of a bank bill has cut it in two to

send by mail, if one part is lost, he can recover the full value by presenting one half and showing loss of the other; contrary custom rejected. Bank of the U. S. *v.* Sill, 5 Conn. 106.

4. The rule that the purchaser of overdue negotiable paper takes it subject to the equities against the party he takes it from. Vermilye *v.* Adams Express Co., 21 Wall. 139, 22 L. ed. 609.

5. The rule that money paid under mistake of fact can be recovered.

A bank cannot arbitrarily make by-laws or institute usages which shall injuriously affect the rights of third parties. If any person deliberately assents to such by-laws or usages, it becomes a different matter, and thereafter, as a mutual understanding or agreement, the bank might doubtless enforce it as towards this individual. But such assent, implying the waiver of valuable rights, will never be presumed simply because the bank has insisted upon laying down the rule for its own conduct. Thus, a by-law or usage requiring all errors in payments over the counter, or in receipts or entries in a depositor's bank-book, to be corrected by the party before leaving the banking-rooms, are absolutely devoid of any effect whatsoever. That as a matter of fact the party did count his money, or did examine the writing or entry before he left the rooms, and that he then made no objection to the accuracy of the transaction, might be admissible in evidence to sustain, so far as it could, the presumption of correctness. But it would be strictly as circumstantial evidence; and the further and independent fact that it was the law or usage of the bank to refuse to make any adjustment unless this process was observed would have nothing whatsoever to do with the matter, and would doubtless not be admitted in evidence, by reason of its entire impertinence. Neither can this power, which the directors could not claim at common law, be asserted by virtue of the authority given them by legislative enactment to regulate the conduct of the business and affairs of the bank. Such authority does not empower them to make rules which shall wrongfully affect the rights of outside dealers with the corporation. Farmers & Mechanics' Bank *v.* Smith, 19 Johns. (N. Y.) 115; Gallatin *v.* Bradford, 1 Bibb (Ky.) 209.

Banking and other usages altering legal rules have been admitted: —

1. The general rules of law as to the time and place and mode of making demand and giving notice of bills and notes, as notice by mail where a party lives in the same town; Chicopee Bank *v.* Eager, 9 Met. (Mass.) 584: Grinman *v.* Walker, 9 Iowa 426; or notice on a day earlier or later than the legal day; Peirce *v.* Butler, 14 Mass. 303; or demand on fourth day of grace; Bank of Washington *v.* Triplett, 1 Pet. 25, 7 L. ed. 37; or on a day previous to what is not a legal, but only a customary holiday. City Bank *v.* Cutter, 3 Pick. (Mass.) 414.

2. The rule that a bank receiving a check for collection has till the close of banking hours on the next business day in which to present it. Rickford *v.* Ridge, 2 Camp. 537; Mohawk Bank *v.* Broderick, 13 Wend. (N. Y.) 133.

3. The rule that a bank to whom a note is sent for collection need not notify all the indorsers. Smedes *v.* Bank of Utica, 20 Johns. (N. Y.) 372.

4. Commencement day at Harvard College (situated three miles from Boston) is not a legal holiday, upon which by statute the Boston banks would be authorized to close. But it has long been their usage to do no business upon that day, and to make demand and give notice, etc. upon commercial paper upon the day preceding, in like manner as in case of Sundays and the like. The courts of Massachusetts have recognized the custom as good. City Bank *v.* Cutter, 3 Pick. (Mass.) 414.

5. A country bank in the State of New York was wont to send paper

rality, justice, and policy, nor to the clearly expressed or implied intent[10] of the parties, nor extrinsic[11] (*i.e.* so aside that one of ordi-

left with it for collection in New York City by the captain of a steamboat plying to the city, instead of sending by mail. It was also wont to send only once a week, except in cases of an unusual accumulation of paper. The steamer arrived in the city early in the evening of the same day on which it started. The court held that the custom was not inoperative as being unreasonable, or as wanting any of the requisites of a good custom; and that, at least as towards all persons affected with knowledge of it, it was valid and binding. Bridgeport Bank *v.* Dyer, 19 Conn. 136.

6. Rules of law as to the powers of bank officers and agents are affected by usage, as where the usage is, that in the absence of the cashier the president signs drafts and checks, the president's signature under such circumstances binds the bank. Palmer *v.* Yates, 3 Sandf. Super. (N. Y.) 137.

7. Paper not negotiable by general law may be so by custom of a locality. Rindskoff *v.* Barrett, 11 Iowa 172.

8. The rule that collecting bank has no right to receive anything but money. Levi *v.* National Bank, 7 Cent. L. J. (Mo.) 247. See note 19 *a*.

9. The rule that a banker must know the signature of his customer, and pays a forged check at his peril. As where it was customary for a bank receiving a check on another bank to make inquiries as to the genuineness of the signature, the drawee bank receiving the check from such bank is protected as to it in assuming that such inquiries have been made. Ellis *v.* Ohio Life Ins. & Trust Co., 4 Ohio St. 628.

10. A custom of common carriers and messengers to leave parcels or notices directed to a particular officer of the bank at some especial desk, or with some officer other than the one named, may be shown; and delivery made in accordance with such custom will be a sufficient discharge of his duty on the part of the carrier or messenger. Hotchkiss *v.* Artisans' Bank, 42 Barb. (N. Y.) 517.

11. An established custom that notices intended for the directors shall be left upon the cashier's desk, will bind any director whose own notes may happen to come into the bank. Weld *v.* Gorham, 10 Mass. 366.

[10] No usage can be set up against the clear intent of the parties. The whole idea of the law is, that when the parties say nothing about the manner in which the contract is to be performed, or the precise meaning they attach to the terms employed, or acts done, their meaning and intent may be arrived at by looking to the *usual* manner of doing such business, and the *usual* meaning and obligations attached to such words and acts.

The theory is that the parties knew the custom, and acted in reference to it, but if they express a contrary intent the theory fails. Barnard *v.* Kellogg, 10 Wall. 383, 19 L. ed. 987; Collender *v.* Dinsmore, 55 N. Y. 200.

[11] A usage of a bank cannot bind a party who has no occasion to believe he will be brought within its operation. Mohawk Bank *v.* Broderick, 13 Wend. (N. Y.) 133.

If there is no intimation whatsoever upon a note, that the maker intended or expected that it would be negotiated at a particular bank, he is not bound by the fact that he has positive knowledge of the usage of such bank in regard to notice, etc. upon such notes. For it does not appear that he anticipated that his note would ever come into this bank, and therefore that this usage would be applied to this particular note. The case of the Lime Rock Bank *v.* Hewett, 52 Me. 531, furnishes an unusually excellent illustration of this doctrine. Two notes were sued

nary prudence and foresight would not contemplate it as a factor in the transaction), binds[12] the parties, on the theory that they contracted in reference to it.

upon in that case, and the same person was an indorser upon each. One of them was made payable at the bank, and was indorsed over by him to the bank. The other was not made payable at the bank, and was indorsed by him generally; indeed, there were subsequent indorsers before the note came into the possession of the bank. The indorser was shown to be personally conusant of a usage of the bank in notifying. Upon the first note it was held that he was bound by this usage; that the circumstances constituted a conclusive presumption of his assent, and would have been equally conclusive of his knowledge had this not been otherwise expressly shown. But upon the second note he was held not bound by the usage. For thought he knew it, yet it was, as regarded this note, a mere abstract fact, there being nothing whatsoever to show that he ever contemplated that the note should pass into the possession of this especial bank, or be subjected to the effect of any of its usages. A usage cannot *directly* affect parties between whom there is no privity of contract. Daun *v.* City of London Brewery Co., L. R. 8 Eq. 155. But it is hardly correct to say it cannot affect them *indirectly;* there being no contract between those parties, it cannot take effect as part of such a contract.

But contracts and usages between A. and B. are far from being without effect on the rights of C. and B., though the latter have not contracted with each other. For example, a by-law or usage of a bank, securing a lien on shares of a stockholder, S., may affect S.'s assignee in insolvency, or an attaching creditor.

A by-law of a bank, or even its usage, if the usage be known to the stockholders, of refusing to allow any stockholder to transfer his stock so long as he is indebted to the bank, is valid and binding. The bank has a lien upon the shares for the amount of its claim, at least as against the shareholder himself, or against his assignees under a voluntary assignment for the benefit of creditors. Morgan *v.* Bank of North America, 8 Serg. & R. (Pa.) 73; McDowell *v.* Bank of Wilmington, 1 Harr. (Del.) 369; Child *v.* Hudson's Bay Co., 2 P. Wms. 207. But whether or not the lien of the bank would be good as against an assignee in bankruptcy, or an attaching or execution creditor, is a different question, which might perhaps receive a different answer. In Massachusetts the point has been considered doubtful. Nesmith *v.* Washington Bank, 6 Pick. (Mass.) 329; Plymouth Bank *v.* Bank of Norfolk, 10 *id.*, 454. So usage bears on negligence.

In the Daun case, A. and B. contracted. A. afterward contracted with C., subject to his contract with B. B. attempted by usage to hold A.'s funds as against C. to a greater amount than the express terms of the agreement between A. and B. warranted. Such a usage might affect A., but was too remote to be reasonably presumed within C.'s contemplation.

[12] Usage may explain doubtful words, or even add terms to a contract. Carter *v.* Phil. Coal Co., 77 Pa. St. 286; Lyon *v.* Culbertson, 83 Ill. 33; Miller *v.* Burke, 68 N. Y. 615; Stevens *v.* Reeves, 9 Pick. (Mass.) 198. A contract for excavation of certain lots was silent as to who should have the sand, etc. taken out, and an established usage giving such materials to the excavator was allowed to add this term to the contract. Cooper *v.* Kane, 19 Wend. (N. Y.) 386.

"Where parties have not entered into any express and *specific* con-

It is sometimes said a usage must be general. See note 18 *c*. Change of usage. See note 1 *b*.

(*a*) The *greatest care* must be taken in each case to examine the usage in reference to each of the requisites, and in the light of decided cases in the State to whose law the matter is subject; for the courts do not agree,[13] the cases are not reducible to harmony. This is where the law is growing, and the crystals are nearer completion in those States whose social life is most saturated with commerce.

(*b*) The question always to be answered is, What is it fair to presume the parties intended? The business must be done in *some* way, and it is more probable they intended a usual than an unusual method. See note 12.

(*c*) But the law will not presume an intention to waive valuable rights [14] unless there is an agreement or understanding to that effect, nor will it ever enforce a usage that is unreasonable or contrary to positive law.

(*d*) And if the usage is in the nature of a contract between other parties, as in the case of clearing-house [15] usages and by-laws,[15] it will not enter into any transactions except those of members or parties to the usage, unless it is shown that the contract was actually with reference to such usage.

One who employs a member of the clearing-house cannot claim the advantage of such usage nor be prejudiced by it. It is deemed extrinsic unless brought in by the parties.

tract, a presumption nevertheless arises that they meant to contract and to deal according to the general usage, practice, and understanding, if any such exists, in relation to the subject matter." 2 Stark. Ev. § 258, 259; 1 Phil. Ev. 420, 421. But if the usage is *narrow*, the presumption may be rebutted by proof of one party that he was ignorant of it, and did not impliedly assent to it. Sawtelle *v.* Drew, 122 Mass. 228; Farmers & Mechanics' Bank *v.* Sprague, 52 N. Y. 605; Walls *v.* Bailey, 49 N. Y. 464.

Two banks entering into a contract must be presumed to do so with the expectation and implied agreement that, in the transaction of the business provided for by that contract each will act according to well known and established rules and customs in such business. Bank *v.* Davis, 114 N. C. 345, 19 S. E. 280; Bank *v.* Bank, 75 *id.*, 534; Marine Bank *v.* Fulton Bank, 2 Wall. 252, 17 L. ed. 785.

[13] Some judges are inclined to follow the early English decisions, others the later ones, which are far more liberal in admitting evidence of usage than the former. At first, usage was permitted to explain doubtful terms, afterward it was further conceded power to *add terms* to contracts though in writing, *i.e.* usage in reference to which the contract is presumably made is a part of the contract.

[14] See note 9.

[15] See note 11 and § 346. See By-laws, § 43 *b*.

So with by-laws and usages of the bank for its internal affairs.

Though, of course, in such cases, third parties may be indirectly [16] affected, as in respect to the question of authority of bank officers. And usage often affects parties between whom there is no contract, by determining the question of negligence.[16]

A usage to do a thing cannot have the same effect as a performance,[17] if in fact the thing was not done.

(*e*) When there are several methods of different degrees of usualness, it often becomes difficult to decide which shall control the transaction. In such cases, the *relation of the parties*, and their actual *knowledge*, are of importance in determining whether the more special usage shall outweigh the more general.

Law Merchant

A general usage of merchants, judicially ascertained and established, becomes a part of the common law that all are held to know, whether they do or not; but in the case of usages peculiar to a single bank, or to the banks of a city or locality, the above points must be regarded.

[16] See note 11.

Judge Story says in his work on Bailments, § 11, that in every community negligence is to be judged of by the actual state of society, the habits of business, the general usages of life, and the dangers as well as the institutions peculiar to the age.

A hotel guest leaves the key in his door. The usage of guests at that hotel is relevant to the question of negligence. Berkshire Woollen Co. *v.* Proctor, 7 Cush. (Mass.) 417.

So drivers of horses and wagons on the highways, and masters and pilots of boats, not passing each other in the usual way, are negligent, unless there is good reason for the variance. Turley *v.* Thomas, 8 Car. & P. 104; The City of Washington, 92 U. S. 31, 23 L. ed. 600.

[17] Piscataqua Exchange Bank *v.* Carter, 20 N. H. 246, and Central Bank *v.* Davis, 19 Pick. (Mass.) 373, rest on the ground that a usage for an indorser to waive demand and notice is not equivalent to a waiver, if he in fact does not in a given transaction waive it. If a by-law requires a person having a certain transaction with a bank to perform a certain act, and he in fact does not perform it, he cannot be affected with the legal consequences of a performance on the ground that it was a usage of the bank to require performance, that he knew the usage, and must be assumed to have intended to conform to it. It was said, that the usage claimed, if proved, would be only a usage for the customer to make such an agreement. By strict construction, therefore, it would not, even if fully shown, have any effect upon a transaction in which the agreement was distinctly *not* made.

Mode of Dealing between the Parties

A course of dealing [18] between the bank and a single person may establish obligations as to its continuance, and, if nothing is provided to the contrary, will govern subsequent transactions, of the same nature, between them.

Habit Peculiar to One Bank

The usage of a single bank will, by reason of the relation of the parties, bind all who *select* [19] that bank to act for them, as one

[18] (*a*) Hotchkiss *v.* Artisans' Bank, 42 Barb. (N. Y.) 517.

(*b*) Presumptions Established by Course of Dealing. — The course of dealing between two banks may be given in evidence for the purpose of raising a presumption from it. This is not precisely a usage; that is to say, it is not always necessary that it should bind the banks as an arbitrary rule for the conduct of their affairs with each other. Therefore the inference based upon it is not absolutely conclusive, but is capable of being rebutted by proof that the habitual course of dealing had, in the particular instance, been departed from. It is strictly as a habit, which gives rise to certain natural suppositions, not as a legal usage which imperatively establishes those suppositions as facts, that such evidence is admitted. Thus, that two banks are wont to exchange accounts at short intervals, and each promptly to object to the account rendered by the other, if it claims any error therein, — and that such accounts have been rendered covering a point subsequently disputed, but not objected to within the usual time, — are acts admissible in evidence, as going to show actual correctness, and that the correctness has been acknowledged. But the same evidence would be incompetent to establish a usage between the banks of objecting promptly, which should have the effect of estopping the bank which had failed so to object from afterwards claiming the correction of the error. Union Bank *v.* Planters' Bank, 9 Gill & J. (Md.) 439.

(*c*) It is only as affecting the question of notice that the generality of a usage is material; for a practice may exist between two only, and yet bind them in all subsequent dealings, unless abrogated by both. Hotchkiss *v.* Artisans' Bank, 42 Barb. (N. Y.) 517.

[19] (*a*) Boston Bank *v.* Hodges, 9 Pick. (Mass.) 420; Bank of Columbia *v.* Magruder, 6 Har. & J. (Md.) 172; Lincoln & Kennebec Bank *v.* Page, 9 Mass. 155; Cohea *v.* Hunt, 2 Sm. & M. (Miss.) 227; Smith *v.* Whiting, 12 Mass. 8; Mills *v.* Bank of the United States, 11 Wheat. 431, 6 L. ed. 512; Chicopee Bank *v.* Eager, 9 Met. (Mass.) 584; Lime Rock Bank *v.* Hewett, 52 Me. 531; Gindrat *v.* Mechanics' Bank, 7 Ala. 325. In Mills *v.* Bank of the United States it was ruled that, where a note is made for the purpose of being negotiated at a bank whose custom it is to demand payment and give notice on the fourth day of grace, that custom binds the parties whether they knew of it or not. By implication they agree to be governed by the usage of the bank at which they have chosen to make the security negotiable. A. sent a note to bank C. to collect; D., the debtor, paid a certificate of deposit of C. to it to satisfy the note. A. was held bound by the custom of C. to take its certificates of deposit in lieu of cash, and D. was discharged, although the bank became insolvent, and never remitted

who is a customer of the bank, or making use of the facilities it holds out. A depositor in a bank, or one who gives a note to a bank to collect, or makes his notes payable there, is properly held imperatively to an implied knowledge of its legal usage in dealing with depositors, collecting or paying such notes. So an indorser of a note payable at the bank, for he selects or adopts as to subsequent parties, and as to the bank.

But the holder of a check on the bank, or payee of a note payable

to A., and in spite of the rule of law that an agent can take nothing but money. British & American Mortgage Co. *v.* Tibballs, 63 Iowa 468, 19 N. W. 319, Reed, J., dissenting.

In Bank of Utica *v.* Smith, 18 Johns. (N. Y.) 230, a note payable at the Mechanics' Bank was presented fifteen minutes after bank hours for other business; but it appeared that, according to the usual course of business at this bank, such presentments were made at this time, and the defendant should have informed himself of it.

(*b*) But the fact that one is the holder of a check drawn upon a bank, or the debtor upon a note held by it for collection, or is the payee of paper made payable at its office, does not bring such person within either the reason or the language of these decisions. He is not a customer, nor, in the sense in which the word is used in these cases, is he one dealing with the bank. He is therefore held to no knowledge of any peculiar habit of this individual bank. He must assume, unless he has positive knowledge to the contrary, that it conducts its transactions like the other banks in the same place; and its usage to conduct them differently in any respect must be specially brought home to him before it can affect him disadvantageously. But the custom of the single bank, once known, enters into all subsequent contracts and dealings with it. Patriotic Bank *v.* Farmers' Bank, 2 Cranch (C. C.) 560; Renner *v.* Bank of Columbia, 9 Wheat. 582, 6 L. ed. 166; City Bank *v.* Cutter, 3 Pick. (Mass.) 414; Bridgeport Bank *v.* Dyer, 19 Conn. 136. The doctrine is very clearly put by Mr. Justice Story in Mills *v.* Bank of United States. If a note is made payable at a particular bank, there is no ground for demanding that the bank shall depart from "general commercial usage" for any other purpose than that of conforming to its own individual usages. Evidence of the usage of any number of other banks not amounting to "general commercial usage" is inadmissible to fix the duties of this especial bank, unless conformity to this particular usage and adoption of it can also be brought home to this bank. It cannot be supposed that "the *particular usage of other banks* not mentioned in the contract" ever fell within the contemplation of the parties to that contract. Camden *v.* Doremus, 3 How. 515, 11 L. ed. 705.

(*c*) Usages of a bank actually known bind dealers with it. Lincoln & Kennebec Bank *v.* Page, 9 Mass. 155; Jones *v.* Fales, 4 Mass. 252. If there is a general usage applicable to a business, one employing an individual of that profession contracts in reference to the usage. Walls *v.* Bailey, 49 N. Y. 464; Ford *v.* Tirrell, 9 Gray (Mass.) 401; Lowe *v.* Lehman, 15 Ohio St. 179; Carter *v.* Philadelphia Coal Co., 77 Pa. St. 286; Sewell *v.* Corp, 1 Car. & P. 392. The fact that a depositor in a savings bank was illiterate, and could not read the rules in his bank-book, did not excuse his non-compliance with a reasonable rule requiring notice of loss of the book. Burrill *v.* Dollar Savings Bank, 92 Pa. St. 134 (1879).

there, or debtor on a note held by it for collection, did not choose that bank to act for him, and has a right [20] to assume that it transacts its affairs like other banks in the same place, unless he has actual knowledge of its peculiar custom; then he is bound by it, if the bank entered as a factor into the transaction within the contemplation of the parties.

No one, however, is held to a bank's usage, though he knows it, if that bank was not contemplated as connected with the business. Such knowledge is extrinsic. See note 11.

It might be thought that, whenever a person enters into a transaction in which he is reasonably aware a particular bank will enter as a factor, he should be held by its customs, known to him or not; but though this principle is recognized in regard to usages one degree superior in generality, the above distinction breaks in upon it in respect to single usage.

General Usage

The general usage of all or a majority of the banks in a place, town, city, or county, is held to be known to all in the particular community, and all who, though dwelling elsewhere, enter into transactions which they must be presumed, as men of ordinary foresight, to know will involve a dealing with or through the banks of said place.[21]

A. **Cases on Usage.** — The usage of a bank, known to persons dealing with it, binds them.[22]

[20] It is very proper that one who deliberately employs a bank should be held to adopt it, usages and all, so far as they are legal and reasonable, etc.; and also that one who, like the holder of a check, has nothing to do with choosing the bank, and for whom the bank is not acting, should be held to less diligence in informing himself of its usages; and in case of a debtor on a note the bank holds for collection, it may often occur that the debtor had no reason to suppose that particular bank would transact the business. See note 19 *b*.

[21] Generally speaking, it cannot be presumed that a person is acquainted with the customs of doing business which obtain among the banks of any place distant from that in which he himself lives and deals. But if he enters into any transaction which he is aware must reasonably be expected to involve a dealing with or through the banks of the distant place, his knowledge of and assent to their customs will be implied. This is only a slight extension of the principle which declares every person dealing with a bank to be affected with knowledge of its usages, and is supported by the cases which assert that doctrine. Bank of Washington *v.* Triplett, 1 Pet. 25, 7 L. ed. 37.

[22] Lincoln & Kennebec Bank *v.* Page, 9 Mass. 155; Taylor *v.* First National Bank, 119 Minn. 525, 138 N. W. 783, 1914A Ann. Cas. 1302, n.

A usage known to the defendant is proper evidence for the jury as to the contract of the parties.[23]

The common law and the general law merchant are in many cases controlled by usage.[24]

Time of Forwarding Check

In Connecticut, D., the holder of a check, got it cashed at the B. Bank, whose custom it had been for years to send checks to New York (where this was payable) by the captain of a boat, once a week, instead of by mail. The jury found that D. knew of this usage, and the court held him bound by it.[25]

Time of Demand and Notice

So, where an indorser, for whom a note was discounted by the City Bank, knew of its custom to regard Harvard Commencement as a holiday, he was bound by the usage.[26]

B. Those who deal with a bank by drawing and indorsing notes payable at the bank, and negotiating notes for discount there, are bound by its usages known to them.[27] In this case an indorser of a note payable to himself at the L. and K. Bank was held by its particular customs known to him.[27]

C. Where a note was payable in the District of Columbia, the general usage of the banks there being to make demand on the *fourth* day after the time limited in the note for its payment, and a bank there discounted it, the indorser, who knew of the custom, was bound by it.[28]

Where a note was payable to Mills, at the United States Bank, and Mills indorsed it, he was bound by the usage to make demand on the fourth day, though he had no knowledge of it. The court said: "Upon the principles and reasoning of the former case (Renner's) we have come to the conclusion that, when a note is made payable or negotiable at a bank whose invariable usage it

[23] Johns *v.* Fales, 4 Mass. 252.

[24] Halsey *v.* Brown, 3 Day (Conn.) 346.

[25] Bridgeport Bank *v.* Dyer, 19 Conn. 136 (1848).

[26] City Bank *v.* Cutter, 3 Pick. (Mass.) 418 (1826).

[27] Lincoln & Kennebec Bank *v.* Page, 9 Mass. 155 (1812); Smith *v.* Whiting, 12 Mass. 8.

[28] Renner *v.* Bank of Columbia, 9 Wheat. 582, 6 L. ed. 166 (1824). A strong case.

is to demand payment and give notice on the fourth day of grace, the parties are bound by that usage, whether they have a personal knowledge of it or not. In the case of such a note, the parties are presumed by implication to agree to be governed by the usage of the bank at which they have chosen to make the security itself negotiable." [29]

Notice by Mail

D. In Alabama, it was held, following 11 Wheaton, that, where a bill appears on its face to be payable at a particular bank, the particular usage of such bank, of giving notice through the mail, instead of personally, though the party is in the same place, binds the parties liable on such bill (indorsers in this case), though the usage was unknown to them.[30]

E. Where it was the custom of a particular bank to devote fifteen minutes, after the close of banking hours for the general business, to paying notes made payable at that bank, and a note so payable was presented in those fifteen minutes, it was held a good presentment. The indorser of the note payable at the bank should have informed himself of its usages.[31]

F. Evidence of usage is not considered as breaking in on the rule that parol shall not be admitted to vary a written contract. The usage is considered as a part of the contract, and the evidence is admitted to *explain* the meaning of the parties.[32]

Usage. Specific Deposits

G. The head-note to an Illinois case would seem to break in on the views advanced in the analysis at the head of this chapter. It says: "The fact that the city bank, which was not the correspondent of the home bank, in pursuance of instructions from that bank, and in the line of custom of the city banks, deposited the money (left with it for transmission to the home bank) with another city bank which was the correspondent of the home bank, will not exempt it from liability, where the original depositor is unacquainted with such custom and instructions."

The fact was, that the court said: "It is not necessary in this

[29] Mills *v.* Bank of the United States, 11 Wheat. 438, 6 L. ed. 514 (1826).
[30] Gindrat *v.* Mechanics' Bank, 7 Ala. 333 (1845).
[31] Bank of Utica *v.* Smith, 18 Johns. (N. Y.) 230 (1820).
[32] Halsey *v.* Brown, 3 Day (Conn.) 346; Renner *v.* Bank of Columbia, 9 Wheat. 582, 6 L. ed. 166.

case to determine the effect to be given to that general usage among city banks."

The decisive consideration was, that the depositary bank sent the money to the correspondent of the home bank without any notice of the true ownership, so that it was applied on the debt of the home bank to said correspondent, and lost to the depositor, the home bank being insolvent.[33]

Where it is the general custom or usage of banks to withhold and refuse payment of checks when notified to do so before they are presented for payment it becomes in the nature of a law pertaining thereto to which checks drawn and deposited are subject, at least while they are in the hands of the payee.[34]

§ 10. **Conflict between State and Federal Courts as to Commercial Questions.** — Under the Judiciary Act,[1] except where the Constitution, treaties, or statutes of the United States otherwise provide, the laws of the several States shall be regarded as rules of decision in trials at common law in the United States courts, in cases where they apply.

But this has no application to questions of the *validity*[2] *or impairment of contracts,* or of *general commercial law*,[3] or any extra-territorial[4] matter, nor does it compel the United States courts to enforce manifest injustice. The United States Supreme Court is *the highest* authority on all questions of general commercial law.

Intra-territorial Matters. Limitations

The rule is confined to matters strictly intra-territorial by the law of nations, *local* statutes, and usages, as those affecting only

[33] Drovers' National Bank *v.* O'Hare, 18 Brad. (Ill.) 360 (1887).

[34] Taylor *v.* First National Bank, 119 Minn. 525, 138 N. W. 783, 1914A Ann. Cas. 1302, n.

[1] § 10. 1789, c. 20, § 34.

[2] If a contract is valid under the decisions of the State at the time of the contract, it will be held good in the Federal courts, although a subsequent decision of the State declares the former judgment erroneous and the contract bad. Gelpecke *v.* Dubuque, 1 Wall. 176, 17 L. ed. 520.

[3] 2 Story on the Constitution, 551; The Gloucester Ins. Co. *v.* Younger, 2 Curt. 338. In Austen *v.* Miller, 5 McLean 154, a certificate of deposit was held a promissory note, in spite of a contrary Ohio decision, it being a question of general commercial law.

[4] A discharge, under Rhode Island bankrupt laws, from all debts and contracts, does not affect a contract to be executed in a foreign country. Van Reimsdyk *v.* Kane, 1 Gall. 371. "I apprehend a limitation of the rule giving effect to State decisions must arise whenever the subject matter is extra-territorial."

citizens of the State, or real estate, and interests of a fixed and permanent nature,[5] and the decisions of the State court of last resort upon such matters, and the construction of such statutes, will be binding on the Federal courts, subject to two limitations: 1st. No State decision on general commercial law,[6] nor as to what is a valid contract, or what is impairing the obligation of a contract, binds the United States courts.[2] If it did, the States could set at naught the constitutional prohibition against destruction of contract rights. 2d. State judgments are only rules of decision, not exclusive or peremptory injunctions,[7] and will not be followed in the face of justice and good faith.

Extra-territorial Matters

State statutes or decisions affecting rights which are neither between citizens of the State and derived under that State, nor are governed by the *lex rei sitæ* under the law of nations,[7] do not control the Federal courts, though recognized as entitled to respectful consideration.

General Commercial Law. Construction of Contract

Further, on questions of general commercial law, *i.e.* commercial questions not dependent on local statutes or local usage, but which must be decided, in whatever court they arise, on the general principles[7] to the commercial law and the custom of merchants,

[5] Van Reimsdyk *v.* Kane, 1 Gall. 371; Bragg *v.* Meyer, 1 McAll. 411. If applied beyond this, it would enable the State legislature to dry up the sources of Federal jurisdiction.

[6] The words of Story in 1 Gall. 371, saying further, "If a State were to declare that no action would lie on a contract between a citizen thereof and a foreigner, or a citizen of another State, under any circumstances, or were to say that interest reserved on such a contract, though good at the place of contract, should be void, it would hardly be binding on the United States courts." This language applies only to extra-territorial matters by its terms; but the whole tone of the Federal decisions is, that they will not enforce manifest injustice in *any* case, merely because a State court has sanctioned it.

[7] Story in Swift *v.* Tyson, 16 Pet. 1, 10 L. ed. 865. And see Robinson *v.* Commonwealth, 3 Sum. 220. In Brooklyn City, etc., R. R. Co. *v.* National Bank of Republic, 22 Albany L. J. 189, a note was given as collateral on a pre-existing debt, to a bank in New York by a citizen of New York. The question was if the bank was a holder for value. New York decisions said no; but the United States court remarked that it was a question arising out of the usage of the commercial world, and, not having been

the Federal courts are not bound by State decisions. "When the State courts are called on to perform the like functions as ourselves, *i.e.* to determine on general reasoning and legal analogies what is the true exposition of the contract, or what is the just rule furnished by the principles of commercial law to govern the case, the rule of the Judiciary Act does not apply." [7]

§ 11. **The Conflict of Laws.** — It would not be proper to attempt any complete statement of the principles of private international law in a work of this kind, but a few points of chief interest to us may be noted, and a caution entered, never to omit in any transaction either of the questions, "By what system of law is this matter controlled?" and, "What has that law to say on the subject?" In banking and all mercantile business that continually runs its roots and branches beyond State and national lines, it is of the utmost import to keep in mind the effect of the various and often conflicting laws that may apply to the transaction.

§ 12. **Contracts**[1] are governed, —

1. As to remedy,[2] by the *lex fori*.

modified by local statute, the Federal courts had equal powers with the State courts to determine such questions.

[1] § 12. For the law of this subject reference must be made to the works of Wharton and Story, from which it is chiefly derived by an intellectual process of condensation. The indexes of those books will enable any point to which no reference is here attached to be verified as well as if all the many sections bearing upon it were quoted by me. For a later and well-arranged treatise, see Minor's Conflict of Laws.

[2] The law of the court in which suit is brought governs in all that relates to practice, pleading, burden of proof, admissibility of evidence (including the competency of witnesses, and the great rules of exclusion, as those regarding hearsay, parol evidence to affect written contracts or explain patent ambiguities, involving, of course, the determination of what *is* a *patent* ambiguity), and the determination of the question what facts are proved by the evidence admitted. But the legal effect of the facts proved by the evidence admitted may depend on other law, to which the construction of the contract is subject. See text, Nos. 3, 4, 7.

If a Statute of Limitation of a State (I.) only says no action shall be brought for the goods or debt after a certain period (P.), it belongs to the remedy, and an action may be brought in another State (where the period is longer) for the debt or goods, though the parties both lived in I. the full time (P.). But if the statute of I. *changes the title*, or *extinguishes the debt*, then as to debts due citizens domiciled in I., and as to property within its territory, the statute once taking effect will not be disturbed elsewhere.

If a Statute of Frauds of a State (I.) merely provides that no action shall be brought on certain contracts unless in writing or conforming to other requirements, it is of the remedy, and such a contract (though made in a foreign country, F., where it is valid and enforceable, there being no such law there), will not be enforced in I.; but such contract made in I. may be enforced in F. If, however, I.'s statute of frauds makes the con-

2. As to the interpretation,[3] by the law and usage the parties had in contemplation.

Personam Rem Distinction

3. As to *direct* [4] action upon real estate (as in all other matters touching immovables, even to the question what property *is* real), the *lex rei sitæ* controls.[4] But the word direct is very important in this connection, for there is a clear distinction [5] between the effect

tract *void*, it acts on the contract itself, and not the remedy; and in such case, so far as the statute of frauds is concerned, a contract valid where made is valid everywhere, and invalid where made is invalid everywhere, except that (1) the *lex situs* controls the forms, etc., of the transfer of property with few exceptions, and (2) contracts made casually in I., and not in accord with its law, are not thereby void in the domicil of the parties, or the country where the contract is to be performed. See text, Nos. 6, 7.

[3] Any court that has to interpret a document, *i.e.* discover the meaning of the parties, will look for that purpose to any law or usages, as well as any facts, the author or parties are shown to have had in mind. Usually the parties think and speak in the terms of the place where the contract is made; but if only casually there (as travellers on a railroad or persons coming to a half-way point to negotiate), it is more likely they contemplate the law and usage of their domicil, or of the place of performance.

In case of a contract by correspondence, the usage of the place of the writer who first employs controverted terms decides their meaning, for he is supposed to use them in the sense with which he is familiar, and the other accepts that meaning by adopting the words.

It is to be distinctly noted, however, that the question whether any evidence at all of the meaning of the parties concerning the point in dispute is to be received, is a preliminary question for the *lex fori;* and also that, if there is conflict between what the author really meant and the meaning attached to the words he has used by the law to which the construction of the document is subject, the latter controls.

[4] Titles by prescription, grant, devise, descent, marriage; easements, servitudes; liens; incumbrances; assignments for benefit of creditors; forms of conveyance and devise, and their construction; legitimacy of one claiming as heir; capacity to acquire or convey in any way. Realty cannot be touched, transferred, or incumbered in any way except in conformity to the *lex situs;* but it is a general principle of the *lex situs* in all civilized countries to give effect to acts done in other sovereignties and valid there, unless they are contrary to the positive law, or the ideas of morality, justice, and public policy existing in the *situs.*

The title of a bank to land must be determined by the law of the state in which the land is situated, and if a mortgage to it is not made in good faith by the State law, the bank gets no title. Chipman *v.* McClellan, 159 Mass. 363, 34 N. E. 379 (1893).

[5] The validity of a mortgage as a lien on the land is controlled by the *lex situs;* but the legality of the contract to which the mortgage is collateral is determined by the law of the place where the contract is made, unless it is to be performed elsewhere, then by that law.

A contract illegal by the law of its place is inoperative, though secured

of a contract as creating a lien or transferring title to specific property, and its effect considered simply as creating obligations between the parties. For example, a conveyance not in accord with the law of Illinois, where the land is, but valid by the law of Massachusetts where it is executed, though it does not of itself change the title to the land, and an Illinois creditor of the assignor or vendor attaching the land after the conveyance will hold against the conveyee; yet as between vendor and vendee the transaction may base a judgment for damages [6] against the vendor if he refuses to make a truly valid deed, or for a decree of the chancellor [7] to compel him to do so.

Estoppel by Domicil

Further it must be remembered that a *person domiciled in Massachusetts* would be estopped,[8] as it were, to deny the validity of a transaction, good by the laws of that State, unless [9] the reason for

by a mortgage on land in a State where such a contract would have been good; Pine *v.* Smith, 11 Gray (Mass.) 38; and if the contract is good by its law, it is not invalid because the mortgage is subject to the law of a State by which such contract would be bad against creditors. Hoyt *v.* Thompson, 19 N. Y. 207.

When a Kentucky Bank took a transfer in Ohio of notes to secure a debt in Ohio the transaction is governed by the laws of Ohio, and if good there will be enforced in Kentucky even though such a transaction would have been invalid in Kentucky because done in contemplation of insolvency. Fawcett *v.* Mitchell, 133 Ky. 361, 117 S. W. 956 (1909).

[6] See Wharton, Confl. of Laws, § 377; Minor, Confl. of Laws, § 11, p. 31.

[7] Where there is an equity between the parties, a court of chancery (if the defendant is domiciled in its jurisdiction, or the contract is performable there, and relief can be obtained by the *personal obedience* of the parties, without direct action on the property, and justice cannot otherwise be done), will compel the party to take specific action in regard to the foreign property, as to deed the land in conformity to the law of the *situs*. But no bill can be entertained which calls for direct action on the land, as for partition, or settlement of boundary. Wharton, Confl. of Laws, § 288; Story, Confl. of Laws, § 545; Minor, Confl. of Laws, § 11, p. 32; McCurdy's App., 65 Pa. St. 291; Wood *v.* Warner, 15 N. J. Eq. 81; Muller *v.* Dows, 94 U. S. 444, 24 L. ed. 207.

[8] An assignment in New York, good there, is valid against a subsequent attachment by a citizen of New York of property in Massachusetts, though such assignment, as against creditors resident elsewhere than at the place of domicil of the assignor, would have been invalid in Massachusetts. Burlock *v.* Taylor, 16 Pick. (Mass.) 335.

[9] Green *v.* Van Buskirk, 7 Wall. 139, 19 L. ed. 109. The owner, mortgagee, and attaching creditor, D., were all domiciled in New York. D. attached the property (iron safes) in Illinois. The United States Supreme Court held the attachment good against the mortgagee, though New York

holding the act invalid in Illinois applies to the case of such a person, as well as to that of a citizen of Illinois.

4. As respects *direct* action upon movables, the forms of transfer and creating liens [9] positively prescribed by the *lex situs* must be conformed to, and all claims of the *lex situs* [10] satisfied, in order to sustain a right to the property in the courts of the *situs*, subject to the same distinctions *personam rem*, and estoppel by domicil, as above.

5. Capacity of dealing with realty is determined by the *lex situs;* capacity of doing business is determined by the law of the place of

had held the contrary. The parties to the mortgage had not conformed to the registry laws of Illinois, and the reason for holding that an incumbrance invalid in such a way has no effect against one without notice applies strongly to every case, whether the creditor attaching be a citizen of the *locus*, or of the State where the contract was made, or of a third State; namely, the great uncertainty, confusion, and insecurity that would result if the record title where tangible property is located could not be depended on. If a purchaser had to search the records of every State in which the owner may have dwelt or made a contract, it would, to say the least, make the obtaining of a clear title somewhat expensive, and men would probably give their land away rather than undertake to make a good title. It seems very doubtful if the mere fact of domicil is ever a solid reason in any of these cases for refusing what would otherwise be admitted justice. The argument that by choice of domicil a party (D.) submits himself to its law, is not more weighty than the counter claim, or rather has its true limits disclosed by the counter proposition, that he submits to *that law so far as it extends*, but does not contemplate its reaching an arm between him and the measure of justice secured to men in general under the law of another State where he may be, or where property he claims is situated. If the law of the *situs* rests on reasons of abstract justice and general convenience, D. should have the benefit of it. If the provisions of the *situs* are merely defensive, only for self-preservation, by preferring the claims of citizens to those of foreigners, D. does not fall within the reason of the law.

If a lien attaches to a vessel in England, valid there, but invalid by Louisiana law as not giving possession to the mortgagee, and the vessel afterwards comes to New Orleans, where persons without notice supply materials to the ship, the Louisiana courts hold the lien of the latter prior to the English incumbrance. Wharton, Confl. of Laws, §§ 323, 345, 357; Minor, Confl. of Laws, § 6, p. 10.

But under United States statutes a duly recorded mortgage on a vessel has priority over a lien under the law of one of the States where the vessel may subsequently be, for materials and supplies furnished it. Harrison *v.* Sterry, 5 Cranch 298, 3 L. ed. 106.

[10] Such as taxes, and the claims of local creditors in case of foreign bankruptcy.

The *situs* of a debt, so far as concerns its taxability, is the domicil of the creditor, for there the fund will go; and also so far as concerns its assignability, for it is a personal right, and governed by his personal law. Wharton, Confl. of Laws, §§ 363, 394; Minor, Confl. of Laws, § 123, p. 281.

the transaction plus the law of the domicil of the actor, whichever most favors the capacity and so sustains the transaction.

6. The form [11] of contracts depends on the *lex situs* of property to be affected, so far as it has positive provisions, in other respects on the *lex loci actus*, so far as imperative and applicable, and beyond both these lines on the law of the *situs*, *actus*, domicil, place of performance, or other law with reference to which it can be shown the parties acted.

7. In all respects, not covered by the above, the law of the "seat" of the obligation, *i.e.* its place of performance, controls, as being the law the parties presumably had in mind, and if there is more than one obligation in a contract, to be performed in different places, each is governed by its own distinctive law.[12]

[11] Form of Deeds, Contracts, etc. — So far as the direct effect on property is concerned, the positive provisions of the *lex situs* must be followed. When the *lex situs* is silent; or if we look at the contract apart from its direct effect upon property; or if the contract is personal: —

a. Provisions of the *lex loci actus* that are imperative (*i.e.* made by that law essential to the validity of the document) must be conformed to, except that our courts will not hold Americans contracting in China, or other uncivilized country, bound to conform to its law. And when parties *casually* in a State execute a contract there, in accord with the law of their domicil, or of the place of performance, or *lex situs*, it will be sustained.

b. The forms of the *lex fori* must be looked to when they are conditions of bringing suit.

c. Where the *lex situs* and *lex loci* are not imperative, and the *lex fori* does not require a certain form to sustain suit, it is sufficient if the document is such that *an intent to give it legal effect can be inferred*. It is a natural presumption from the omission of the forms usual where the business is done, that the instrument is not intended to be final, but only a preliminary informal draft. If it can be shown that the parties have actually conformed to the forms usual in their domicil, or in the place of performance, or other place clearly in their contemplation, the above presumption is rebutted, the substantial requisite fulfilled, and the contract should be sustained.

[12] In the case of bills and notes the contract of the maker or acceptor is governed by the place of payment, which, unless some other is named, is the place where the contract is made, usually the place of *delivery*. See notes 15 and 18.

If a blank indorsement in France does not pass the property to holder, such an indorsee cannot recover in England, though he could sue in England if the indorsement had been made in England. Trimbey *v.* Vignier, 1 Bing. N. C. 151.

A parol acceptance by B. of a bill drawn in Michigan on B., in Chicago, was good, though the laws of Michigan require an acceptance to be in writing. Mason *v.* Dousay, 35 Ill. 424.

If a note payable in Massachusetts is indorsed in another State, the maker's liability to the indorsee is ruled by Massachusetts law. Woodruff *v.* Hill, 116 Mass. 310; Hunt *v.* Hunt, 16 N. Y. Sup. Ct. 622; Evans *v.* Anderson, 78 Ill. 558.

The construction, nature,[13] mode, and legality of a contract depend on the law of its seat.

But the contract between the immediate parties to an indorsement is subject to the law of the place where the indorsement is made, unless another be named by the indorser. National Bank of Michigan *v.* Green, 33 Iowa 140.

The working of these principles leads to some curious results: —

The *liability* of an indorser or drawee is determined by the liability of the maker or acceptor at their contract seat; but when the indorser's liability is once fixed, the law as to payment in a suit against the indorser is governed by the law of the place of indorsement. Freese *v.* Brownell, 35 N. J. L. 285; Ripka *v.* Geddis, 23 Pa. St. 140.

If a bill or note is defective in formal matters at the place where made, but good at the place of indorsement, the indorsement may bind the indorsers, though not the original parties; otherwise, if the defect is substantial. Wharton, Confl. of Laws, § 458.

So a transfer defective where made, but valid by the law to which the maker or acceptor is subject, binds him, though not the indorser. Wharton, Confl. of Laws, § 459.

Each holder has the same rights against the acceptor or maker as the original payee, if the transfer to the holder was good by the law of the place of the maker's or acceptor's contract, though bad by the law where the indorsement was made, for the maker's obligations are governed by his law. Robertson *v.* Burdekin, 1 Ross, Lead. Cases, 812.

On the other hand, if the indorsement is bad by the original law, though good by its own law, the maker or acceptor is not bound by it, except, it is said, if the maker use words that in another State (Y.) give negotiability, though not in his own, he will be held on the suit of D. (to whom the note was indorsed in Y.) in the courts of Y., though not in the courts of his own State perhaps. Lodge *v.* Phelps, 1 Johns. Cas. (N. Y.) 139.

Grace. Days of grace are allowed according to the law of the place of payment. Pomeroy *v.* Ainsworth, 22 Barb. (N. Y.) 118.

Demand. Protest. Notice. That demand and protest are governed by the law of the place of payment the authorities are agreed, and the better opinion is that notice is equally controlled thereby. The nature and extent of the liability of the drawer or indorser, when once fixed, are settled by the law of his own obligation; but the *fixing* of his liability is another thing, that should be controlled by the law of the place of payment by acceptor or maker, since it is only by such conduct toward the maker or acceptor as is required by the latter law that said liability can be fixed; and though notice is not a part of the conduct toward maker or acceptor, it is an act done in that place, and the principle *locus regit actus*, and the security and convenience of business, require that it should be placed in the same class. It would be very confusing to have to conform to the law of four or five different countries, in which successive indorsements may have been made, in order to charge all the indorsers. There are, however, authorities that hold the notice to drawer or indorser must conform to the law of the place where the drawing or indorsement occurred. See Daniell on Neg. Inst., § 910. When the liability of an indorser is once fixed, the notice he must give to *his indorser* is of course governed by the law of their special contract. National Bank of Michigan *v.* Green, 33 Iowa 140.

[13] That is, whether it is joint, or several, or joint and several; abso-

What is the place of performance, or seat of the contract, is a question of the mutual intent of the parties, to be derived from their language and the circumstances.

If a place is named, of course there is no trouble, as, in case of a note, the place of payment governs as to the mode of payment, grace, demand, protest, and notice.[12]

Or if the place of performance is fixed by the necessity of the case, as when work is to be done on land.

The seat of a continuous [14] business gives its law to all obligations in the course of such business emanating from him who conducts the business, as with bank collections.

Delivery of goods to a carrier for the vendee is such performance as makes the place of delivery the seat of the contract, which determines the right of stoppage *in transitu*, etc.

The parties may in many cases incorporate the law of a particular State in their contract by reference to it.

Where there are two laws which might be applied, as, for example, in case of interest,[15] that most favorable to the contract should govern; and if the interest is proper in the place where the money is used, that should justify it, for that is the real place of performance as to the *risks* incurred, which are the basis of interest.

When a person is *casually* out of his domicil and contracts, if the circumstances point to a performance where made, State C., as in case of hotel bills and watering-place debts, or bargains in general with the natives, that law governs; but if *both parties*

lute or conditional; personal or real; principal or surety; negotiable or not.

[14] Wharton, Confl. of Laws, §§ 405, 426; Minor, Confl. of Laws, § 67.

[15] When no rate is specified, the place of payment decides the interest. The acceptor pays interest according to the law of the place of acceptance, and the drawer or indorser according to the law of his own contract. 2 Parsons, N. & B. 376; Gibbs *v.* Fremont, 20 Eng. L. & Eq. 555; Smith *v.* Smith, 2 Johns. (N. Y.) 235. If a rate is named, it is valid if the law either [1] of the place of payment or of making the contract allows such rate; and some cases [2] hold that, if allowed by the law of the place where the money is to be used and the *risk* incurred, it is valid, for the place of payment or making may be determined merely by convenience, and have no relation to the real value of the money at the place where it is invested. It is hard that money lent to be used in New Mexico (where interest is constantly 24%, showing the value of money there and the risk) should legally bear no more than 6%, because payable in some Eastern State.

[1] Peck *v.* Mayo, 14 Vt. 33; Depau *v.* Humphreys, 8 Mart. N. S. (La.) 1; Potter *v.* Tallman, 35 Barb. (N. Y.) 182. [2] Young *v.* Godbe, 15 Wall. 562, 21 L. ed. 250; Wharton, Confl. of Laws, § 508, and cases cited.

are casually [16] in C., perhaps only for the purpose of negotiation, it may be more reasonable to regard the domicil of the debtor as the place of performance; *e.g.* where, in Tennessee, Georgia parties give or indorse a note payable in future to New York parties without naming a place of payment, Georgia is the seat of contract.

When the place of performance is not otherwise determinable, it is deemed that the place where the contract was made [17] was so intended, and it is not the place of dating, writing, or signing, but the place of *delivery*, where the bargain is consummated, that constitutes the place of making, *except* [18] as to *bona fide* purchasers of negotiable paper, for value, without notice that it was not delivered where dated; as to them, the law to which the paper purports on its face to be subject governs.

[16] In Vanzant *v.* Arnold, 31 Ga. 210, the plantiffs resided in New York, the makers and indorsers in Georgia, and the indorsement and delivery were in Tennessee, to the plaintiff's agents. The court said it was known the indorsers resided in Georgia, and were only in Tennessee to negotiate, and the parties must be deemed to have contemplated Georgia as the place of performance. But if the transaction in Tennessee were between a Georgian and a native or resident of Tennessee, it would be very likely a Tennessee contract. See Story, Confl. of Laws, § 274.

[17] When a note is payable generally, evidence that it was agreed to be paid in a particular place is inadmissible; the law makes it payable where made. Frazier *v.* Warfield, 9 Sm. & M. (Miss.) 220.

[18] A note drawn and dated in Maryland, but delivered in New York in payment of goods purchased there, is payable in New York and governed by its laws. Cook *v.* Moffat, 5 How. 295, 12 L. ed. 160. The place of *delivery* from maker or drawer to payee, or from indorser to indorsee, is the contract seat, except as against *bona fide* purchasers for value, in the usual course of business, and without notice that the place of dating and drawing does not truly represent the place of delivery. In Lennig *v.* Ralston, 23 Pa. St. 139, the bill bore the dress of a Pennsylvania bill, though really issued in London. The court said: "Upon the principle that every one is presumed to produce all the consequences to which his acts naturally and necessarily tend, the presumption is the defendants intended the purchasers of it should receive it under the belief that it was a bill drawn in Philadelphia in the usual course of business."

As against a *bona fide* purchaser before maturity, without notice, the paper cannot be shown by parol to be other than what it claims on its face to be. So against such an indorsee (B.), the maker or indorser cannot show that a note dated in Massachusetts, and indorsed there to B., was really made in New York, and was void by New York law. Towne *v.* Rice, 122 Mass. 67.

PART I

BANKS AND BANKING IN GENERAL

CHAPTER II

ORGANIZATION AND LOCATION

§ 13. Who may be a Banker.
Common Law.
Restraining Acts.
Purpose.
Apply to continuous functions, not to isolated acts.
For violation of these statutes there is no remedy but the one they provide.
§ 13 A. Supervision of Banking.
§ 14. Organization.
By Charter. § 6, n. 1, 3, 4; § 98 *f*; §§ 743, 744, 750, 171 *j*.
Under General Law.
Number of members.
Amount of capital. II. §§ 7, 14, 81.
Mode of paying it in.
Certificate of organization acknowledged and recorded. II. §§ 6, 106 *a*; II. §§ 12–15, 102.
(*a*) Existence of the bank. § 765.
Evidence of.
Judicial Notice of the Charter.
§ 15. Ancillary Powers of a Bank.
To sue and to be sued.
To have a corporate seal.
To have perpetual succession.
To appoint and qualify officers.
To make by-laws.
To increase or reduce the capital.
§ 16. Appointment and Qualifications of Officers. II. §§ 9, 10.
Directors, how elected.
qualifications of.
President.
Cashier.
Clerks.
Term of office.
Bond.

§ 13. **Who may be a Banker?**[0] — Any one, at common law. Banking statutes may or may not restrict individuals in this matter, to protect the public from fraud and incompetency; but the restriction, when it exists, applies to a continuous exercise of one or more of the functions of banking, and not to isolated acts. And no remedy but that provided in the statutes exists for their violation.

At common law, the right of banking pertains equally to every member of the community. Its free exercise can be restricted[0a]

[0] § 13. For the meaning of the terms "individual banker" and "private banker" see People *v.* Young, 207 N. Y. 522, 101 N. E. 451 (1913).

[0a] The business of banking is so closely related to the public welfare that it properly falls within the police power of the State. Schaake *v.* Dolley, 85 Kan. 598, 118 Pac. 80, 1913A Ann. Cas. 254, n., 37 L. R. A. (N. S.) 877. See also Bruner *v.* Citizens' Bank, 134 Ky. 283, 120 S. W. 345 (1909); State *v.* Richereek, 167 Ind. 217, 77 N. E. 1085, 5 L. R. A. (N. S.) 874, 119 Am. St. Rep. 491, 10 Ann. Cases 899 (1906); United States Fid. etc. Co. *v.* Poetker, 180 Ind. 255, 102 N. W. 372 (1913); State Savings etc. Bank *v.* Anderson, 165 Cal. 437, 132 Pac. 755 (1913); Bank of California *v.* San Franeisco, 142 Cal. 276, 75 Pac. 832, 100 Am. St. Rep. 130, 64 L. R. A. 918 (1904); Cartmell *v.* Commercial Bank etc. Co., 153 Ky. 798, 156 S. W. 1048 (1913); State *v.* Struble, 19 S. D. 646, 104 N. W. 465 (1905); *In re* Rosett, 203 Fed. 67 (1913); *id.*, 204 Fed. 431 (1913); Northwestern Trust Co. *v.* Bradbury, 117 Minn. 83, 134 N. W. 513 (1912); Noble State Bank *v.* Haskell, 219 U. S. 104, 55 L. ed. 112, 31 Sup. Ct. 186, 32 L. R. A. (N. S.) 1062, 1912A Ann. Cas. 487 (1910); Engel *v.* O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. 190 (1910), holding that banking business is within the police power of the State, especially such business transacted in small amounts and with ignorant immigrants, and a statute regulating the business may make distinctions depend upon the degree of evil, and where size is an index of the evil to be prevented, there may be a diserimination between the great and small.

The State has a constitutional right to regulate banks. *In re* Rosett, 203 Fed. 67 (1913); *id.*, 204 Fed. 431 (1913); Engel *v.* O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. 190 (1910). And it is immaterial that they were incorporated before the legislation was enacted. Eureka Bank Case, 35 Nev. 80, 126 Pac. 655 (1912). To "regulate" and to "control" are synonymous terms, State *v.* McPherson, 30 S. D. 547, 139 S. W. 368 (1913), and a law which says that whenever the superintendent of banks shall have reason to believe that any bank is in an unsound or unsafe condition to transact the business for which it is organized or that it is unsafe or inexpedient for it to continue business, the superintendent of banks may forthwith take possession of such banks and retain such possession until such bank shall resume business or its affairs be finally liquidated, as provided and giving the bank only ten days in which to appeal is not contrary to the fourteenth amendment of the Constitution of the United States. State Savings etc. Bank *v.* Anderson, 165 Cal. 437, 132 Pac. 755 (1913), citing other states.

And an act is not unconstitutional which establishes a *depositor's guarantee fund* to insure depositors against loss when the bank becomes insolvent and makes the bank liable for the assessment. Lankford *v.* Platte

only by legislative enactment; but that it legally can be thus restricted has never been questioned.[1] After laws upon the subject have been passed, the business must be undertaken and conducted in strict accordance with all the provisions contained in them. It is not in its nature a corporate franchise, though it may be made such by legislation, and individuals may be pro-

Iron Works Co., 235 U. S. 461, 59 L. ed. 316, 35 Sup. Ct. 173 (1915); Assaria State Bank *v.* Dolley, 219 U. S. 121, 55 L. ed. 123, 31 Sup. Ct. 189 (1910) affirming 179 Fed. 461; State *v.* Farmer's National Bank, 150 Pac. 212, Okla. (1915); Noble State Bank *v.* Haskell, 22 Okla. 48, 97 Pac. 590 (1909), affirmed in 219 U. S. 104, 55 L. ed. 112, 31 Sup. Ct. 190 (1910); Shallenberger *v.* First National Bank, 219 U. S. 114, 55 L. ed. 117, 31 Sup. Ct. 189 (1910); Abilene National Bank *v.* Dolley, 228 U. S. 1, 57 L. ed. 707, 33 Sup. Ct. 1 (1912); and the fact that a national bank might suffer through competition is immaterial, *id.* But the guarantee fund does not apply to depositors of the permanent school fund, which is protected by Comp. Laws 1909, sec. 7843. Columbia Bank etc. Co. *v.* United States Fid. etc. Co., 33 Okla. 535, 126 Pac. 556 (1912); Columbia Bank etc. Co. *v.* Southern Surety Co., 35 Okla. 401, 134 Pac. 960 (1910); nor to county deposits, Lovett *v.* Lankford, 145 Pac. 767, Okla. (1915). And the State has a first lien on the assets of any default bank for the benefit of the Depositors Guarantee Fund until after the sufficiency of the fund is made up. Lankford *v.* Oklahoma Engraving etc. Co., 35 Okla. 404, 130 Pac. 278 (1913). See also Lankford *v.* Schroeder, 147 Pac. 1049, Okla. (1915). See *In re* Rosett, 204 Fed. 431 (1913), upon the distribution of the fund. A bank may also be required to accumulate and maintain a *reserve fund*. St. Charles State Bank *v.* Winfield, 36 S. D. 493, 155 N. W. 776 (1915); Mulcahy *v.* Hibernia Sav. etc. Soc., 144 Cal. 219, 77 Pac. 910 (1904).

[1] In Brady *v.* Mattern, 125 Iowa 158, 100 N. W. 358, 106 Am. St. Rep. 291 (1904) it is said that the right and duty of regulating banking has been recognized in practically all the states. *Contra*, see State *v.* Scougal, 3 S. D. 66, 51 N. W. 858 (1892). The restriction cannot extend so far as to amount to prohibition. *Ex parte* Pittman, 31 Nev. 43, 99 Pac. 700, 22 L. R. A. (N. S.) 266, n. (1909); Marymont *v.* Nevada State Banking Board, 33 Nev. 333, 111 Pac. 295, 1914A Ann. Cas. 162, n., 32 L. R. A. (N. S.) 477. But see Noble State Bank *v.* Haskell, 219 U. S., 104, 55 L. ed. 112, 31 Sup. Ct. 186, 32 L. R. A. (N. S.) 1062, 1912A Ann. Cas. 487 (1910), which in speaking of legislation says: "We are of the opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe," which, however, was said to be obiter in Eureka County Bank Habeas Corpus Cases, 35 Nev. 80, 126 Pac. 655 (1912). Wisconsin also holds that the regulation cannot amount to prohibition, but that requiring incorporation as a condition precedent to banking is regulation. Weed *v.* Bergh, 141 Wis. 569, 124 N. W. 664, 25 L. R. A. (N. S.) 1217 (1910). See also State *v.* Woodmansee, 1 N. D. 246, 46 N. W. 970, 11 L. R. A. 420 (1890); Brady *v.* Mattern, 125 Iowa 158, 100 N. W. 358, 106 Am. St. Rep. 291 (1904). But see Marymont *v.* Nevada State Banking Board, 33 Nev. 333, 111 Pac. 295, 1914A Ann. Cas. 162, n., 32 L. R. A. (N. S.) 477, citing and reviewing many cases and holding that the banking business cannot be denied to individuals and restricted to corporations.

hibited from transacting it, either altogether in all its departments,[1a] or partially in any specified ones.[1b] A law which forbids the carrying on of "any kind of banking business" is a total prohibition against each particular department of the business, though conducted singly, and may be infringed equally by exercising any separate one of the various banking functions as by exercising all.[2]

Isolated Acts

But the restraining statutes,[2a] being really in derogation of common law rights, will always be interpreted with reasonable liberality in favor of the supposed infringer; and when they are penal in their character, they will be construed with considerable strictness in his favor. Isolated acts do not constitute an infringement. Thus, discounting notes is one of the most important of banking functions, and the one which, next to the utterance of bills for circulation,[3] is of most interest to the public, and has therefore been most frequently and most carefully regulated by statute. But any person may occasionally discount a note for another without coming within the legislative prohibition. If he is simply dealing with his own funds, he is not properly encroaching upon the business of banks in the same department. For, in order to bring discounting within the proper definition of a banking function, it must be done with money, in part at least that of other persons, intrusted to or deposited with the discounter, so that he has the practical use and control of it for these purposes as fully as if it were his own. Even if he does use

[1a] That it is the inherent right of every citizen to engage in the banking business is held in *Ex parte* Pittman, 31 Nev. 43, 99 Pac. 700, 22 L. R. A. (N. S.) 266, n. (1909).

[1b] Quoted in Brady *v.* Mattern, 125 Iowa 158, 100 N. W. 358, 106 Am. St. Rep. 291 (1904).

[2] Curtis *v.* Leavitt, 15 N. Y. 9, 52; Attorney-General *v.* Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; The People *v.* Same, 15 Johns. (N. Y.) 358; Same *v.* Bartow, 6 Cow. (N. Y.) 290; Nance *v.* Hemphill, 1 Ala. 551; State *v.* Williams, 8 Tex. 255.

[2a] In Illinois there must be a *certificate of authority* to commence business. People *v.* Brady, 268 Ill. 192, 108 N. E. 1009 (1915). The auditor may in his discretion withhold the certificate, but his discretion is not arbitrary. People *v.* Brady, *supra*. A *license* may be required. See Engel *v.* O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. 190 (1910); Commonwealth *v.* Grossman, 248 Pa. St. 11, 93 Atl. 781 (1915).

[3] The power of issuing "bills or paper credit designed to circulate as money" is the only banking power made a franchise under the constitution of South Dakota. State *v.* Scougal, 3 S. D. 65, 51 N. W. 858 (1892).

the money of others, he must do it, not on comparatively rare occasions, and as the special agent of each one of them empowered to this specific end; but with some degree of frequency, and as a general agent having control of the combined or intermingled funds of several.[4] In New York, restraining statutes,[4a] penal in nature, and treating in their exact phraseology only of "associations or companies", have been declared to have no application to individuals.[4b] Any single person may enjoy all his common law rights unimpeded by them.[5] But, upon the other hand, no person can enjoy any of the powers or privileges granted or appurtenant to associations or companies, even though for the purpose of conducting his business he assumes the style of a corporation. He may furnish all the capital, may control all the business, may be practically the bank itself, yet he must go through all the forms of organization prescribed in the organic banking laws of the country or State before he can be entitled to any of the rights which inhere in corporations only by virtue of those laws.[6]

The *purpose of restraining acts* is, of course, to secure the public welfare and safety from the inroads of incompetent men and swindlers. But, serious as is the evil to be guarded against, no other means of defence against it appear to exist save precisely those penalties which are provided in the law itself for any breach of the law. *No other punishment* can be inflicted than that laid down in the statute, and means of prevention can be sought only from the same source.[6a] Equity will not intervene to check infringe-

[4] Utica Ins. Co. *v.* Scott, 8 Cow. (N. Y.) 709; People *v.* Brewster, 4 Wend. (N. Y.) 498.

[4a] The laws of 1907 requiring a bond to be given by those engaged in the transmission of money to a foreign country is constitutional. Musco *v.* United Surety Co., 132 App. Div. 300 (1909), 117 N. Y. S. 21. As to who may sue on the bond see Guffanti *v.* National Surety Co., 133 App. Div. 610 (1909), 118 N. Y. S. 207, aff'd, 196 N. Y. 452, 90 N. E. 174, 134 Am. St. Rep. 848; Alessandro *v.* People's Surety Co., 143 App. Div. 145 (1911), 127 N. Y. S. 572; Carozza *v.* Russo, 146 App. Div. 772 (1911), 131 N. Y. S. 448.

[4b] New York statutes do not apply to restrain individuals.

[5] Bristol *v.* Barker, 14 Johns. (N. Y.) 205; Codd *v.* Rathbone, 19 N. Y. 37. To the same effect is also the law in Illinois. Hunt *v.* Divine, 37 Ill. 137.

[6] Hallett *v.* Harrower, 33 Barb. (N. Y.) 537.

[6a] The provisions of section 497 of the Political Code of Montana as amended by the Act of 1903 (Laws 1903, p. 184, chap. C) requiring banks incorporated under the laws of Montana to pay certain fees with penalties prescribed by section 498, for non-compliance, does not apply to a foreign

ments, and even systematic conduct of the banking business, in direct contravention of enacted law, will not be enjoined on the ground that it is a mischief or a nuisance to the community.[7]

§ 13 A. **Supervision of Banking.** — A state may invest the supervision of banks in a bank commissioner or other examiner, and grant to him visitorial powers over banks and impose upon him the duty of examination of banks, the investigation of their solvency, and the winding up of their affairs if the protection of the depositors demands such action.[1] He may examine the records of the bank,[2] change the personnel of the board of directors,[3] and establish rules for the proper discharge of his duty.[4] His power should not be unduly narrowed by construction,[5] nor can he be removed by the governor.[6]

§ 14. **Organization.** — A banking corporation may come into existence, either under a special act of incorporation, called a charter,[1] or under a general law.[1a] The latter is the more just,

bank doing business within the State. State *v.* Ætna Banking etc. Co., 34 Mont. 379, 87 Pac. 268 (1906).

[7] Attorney-General *v.* Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; Same *v.* Bank of Niagara, 1 Hopk. (N. Y.) 354.

[1] § 13 A. State *v.* People's U. S. Bank, 197 Mo. 574, 94 S. W. 953 (1906); State *v.* Title Guaranty etc. Co., 152 Pac. 189, Idaho (1915); Scribner State Bank *v.* Ransom, 35 S. D. 244, 151 N. W. 1023 (1915); State *v.* Young, 137 La. 102, 68 So. 241 (1915); State *v.* American Surety Company, 26 Idaho 652, 145 Pac. 1097 (1914); *In re* Union Bank, 204 N. Y. 313, 97 N. E. 737 (1912); Sanders State Bank *v.* Hawkins, 142 S. W. 84, Tex. Civ. App. (1911); State *v.* Cockell, 27 Okla. 630, 112 Pac. 1000 (1910); State *v.* Struble, 19 S. D. 646, 104 N. W. 465 (1905); State *v.* Rhame, 92 S. C. 455, 75 S. E. 881, 1914B Ann. Cas. 519 (1912); Lafayette Trust Co. *v.* Higginbotham, 136 App. Div. 747 (1910), 121 N. Y. S. 489; *In re* Harris, 221 U. S. 274, 55 L. ed. 732, 31 Sup. Ct. 557 (1911); *In re* Mandel, 224 Fed. 642 (1915).

[2] State *v.* Cockell, *supra.*

[3] State *v.* People's U. S. Bank, *supra.*

[4] St. Charles State Bank *v.* Winfield, 36 S. D. 493, 155 N. W. 776 (1915).

[5] *In re* Union Bank, *supra.*

[6] State *v.* Rhame, *supra.* See State *v.* Young, 137 La. 102, 66 So. 241 (1915), on his term of office.

[1] § 14. The New York Constitution, art. 8, § 4, prohibits any special charter for banking purposes. See New York Trust & Loan Co. *v.* Helmer, 12 Hun (N. Y.) 35.

[1a] A bank cannot establish a branch in the absence of statutory permission. Bruner *v.* Citizen's Bank, 134 Ky. 283, 120 S. W. 345 (1909). Banks can only be lawfully organized and authorized to do business in Kentucky as provided by the banking law. Commercial Banking etc. Co. *v.* Citizens' Trust etc. Co., 153 Ky. 566, 156 S. W. 160, 1915C Ann. Cas. 166, n., 45 L. R. A. (N. S.) 950, n.

The Superior Court can confer no power upon a corporation to do a

giving the same rights to all persons who fulfil the conditions as to number,[2] of those combining to form the company, amount of capital,[3] manner of paying it in,[4] making the organization certificate,[5] and having it properly acknowledged and recorded.[6]

It may extend its corporate existence by complying with the requirements of statute.[6a]

banking business. Steed *v.* American National Bank, 136 Ga. 693, 71 S. E. 1116 (1911).

When a banking corporation is attempted to be formed in a territory where there is no law authorizing a banking corporation, but a law is subsequently passed providing that any company theretofore incorporated for doing a banking business should be entitled to all the privileges, immunities and powers conferred by the amended statutes on its filing a certificate with the secretary of the territory setting forth its acceptance of the statute, such bank, though not filing the certificate, is, upon subsequently receiving deposits, a *de facto* corporation. Mason *v.* Stevens, 16 S. D. 320, 92 N. W. 424 (1902).

The repeal of a general banking incorporation law should not be construed as intended to repeal the charters of corporations formed under such law previous to its repeal when the manifest purpose of the repealing act is to revise the former laws upon the subject, and make substitution without changing its general policy to interfere with corporations formed under it. Smock *v.* Farmers' Union State Bank, 22 Okla. 825, 98 Pac. 945 (1908).

In Georgia a statute, Acts 1898, p. 78, authorizing the Secretary of State to grant charters to trust companies with banking privileges is not a violation of article 3, section 7, paragraph 18 of that State as the companies provided for in the act are embraced within the description "banking" as used in the constitution. Mulherin *v.* Kennedy, 120 Ga. 1080, 48 S. E. 437 (1904).

[2] In Massachusetts, ten or more. R. L. c. 115, § 1. National bank, five or more. Part II. § 5.

[3] One hundred thousand to one million in Massachusetts. P. S. 673. National bank, see Part II. § 7. In Missouri only five thousand is required of private bankers. State *v.* Cook, 174 Mo. 100, 73 S. W. 489 (1903).

[4] In Massachusetts one half must be in the bank vaults in gold and silver, and examined by three commissioners, before the bank can go into operation, and a majority of the directors must take oath that the money was paid in by the stockholders towards the payment of their respective shares, and not for any other purpose. R. L. c. 115, § 3. National bank, Part II. § 14.

[5] A Massachusetts certificate must state the corporate name, city or town of location, amount and number of shares of capital stock, name, residence, and shares of each stockholder, and the time the bank is to go into operation. R. L. c. 115, § 4. National bank, see Part II. § 6.

See Jones *v.* Cook, 174 Mo. 100, 23 S. W. 489 (1903).

[6] Massachusetts certificate must be acknowledged before a justice, recorded in registry of deeds for county or district of bank's location, and a copy filed in office of the State secretary. R. L. c. 115, § 4. National bank, see Part II. § 6.

[6a] Cascade Bank *v.* Yoder, 39 Mont. 202, 103 Pac. 499 (1909).

a. **The Evidence**[7] **of the Bank's Existence** is the organization certificate,[7a] or the charter, as the case may be. The former is brought before the court by certified copy;[7b] the latter will in some States be *judicially noticed;*[8] in others, it must be pleaded and proved.[9]

[7] Where a note is given to a bank, the maker cannot afterwards deny the right of the bank to sue thereon on the ground that the said bank has not corporate existence. Exchange National Bank *v.* Capps, 32 Neb. 242, 49 N. W. 223 (1891); Bair *v.* Bank, 27 Neb. 577, 43 N. W. 347 (1889); Missouri Valley Land Co. *v.* Bushnell, 11 Neb. 192, 8 N. W. 389; Platt Valley Bank *v.* Harding, 1 Neb. 461. A person who has dealt with a *de facto* banking company cannot object to defects in its organization as affecting its capacity to sue, in order to avoid a joint liability to it. Bank of Port Jefferson *v.* Darling, 91 Hun (N. Y.), 236; Camp *v.* Land, 122 Cal. 167, 54 Pac. 839; R. L. c. 115, § 4; Part II. § 6. In New York corporate existence need not be proved unless denied in the answer. Code Civ. Prac. § 1776. The comptroller's certificate under United States, Rev. Sts. § 5169, is conclusive as to the regularity of the proceedings organizing a national bank. Casey *v.* Galli, 94 U. S. 673, 24 L. ed. 168; Keyser *v.* Hitz, 2 Mackey (D. C.) 514 (1883). Such certificate that the bank has complied with the law, etc., and was authorized to do business, and proof that it has done business for several years, is good evidence of existence. Mix *v.* National Bank of Bloomington, 91 Ill. 20 (1878); Hallstead *v.* Coleman, 143 Pa. St. 352, 22 Atl. 977. Where a bank has taken steps to extend its corporate existence and has thereafter operated and been treated as a banking corporation a borrower is estopped to deny that it had no legal existence. Campbell *v.* Perth Amboy Shipping Co., 70 N. J. Eq. 40, 62 Atl. 319 (1905). When a mortgage recites that a deed is subject to the claim of a particular bank it imports that such bank is a corporation. Anglo-California Bank *v.* Field, 146 Cal. 644, 80 Pac. 1080 (1905).

[7a] If a state bank complies with the statute in increasing its capital stock and in extending the term of its corporate existence the Secretary of the State must file the certificate extending the terms of corporate existence. Cascade Bank *v.* Yoder, 39 Mont. 202, 103 Pac. 499 (1909). If he refuses to issue the certificate to one qualified to receive it the Court may, by mandamus, compel him to do so. State *v.* Cook, 174 Mo. 100, 73 S. W. 489 (1903).

[7b] In First National Bank *v.* Schmitz, 90 Minn. 45, 95 N. W. 577 (1903), the question is not decided whether original must be presented or whether the certified copy is sufficient.

[8] Shaffer *v.* Hahan, 111 N. C. 1, 15 S. E. 1033 (1892); National Bank *v.* Galland, 14 Wash. 502, 45 P. 35 (1896); Stribbling *v.* Bank, 5 Rand. (Va.) 132; Bank of Utica *v.* Magher, 18 Johns. (N. Y.) 341; Vance *v.* Bank, 1 Blackf. (Ind.) 80; Towson *v.* Havre de Grace Bank, 6 Har. & J. (Md.) 47; Williams *v.* Union Bank, 2 Humph. (Tenn.) 339; Hays *v.* Northwestern Bank, 9 Gratt. (Va.) 127. The court will take judicial cognizance of the expiration of a bank charter, and thereupon dismiss an action. Terry *v.* Merchants & Planters' Bank, 66 Ga. 177. The West Virginia courts will take judicial notice of the Virginia act incorporating the Northwestern Bank of Virginia; its existence being preserved by the West Virginia constitution of 1863, art. 11, § 8, and of 1872, art. 8, § 36. Northwestern Bank of Virginia *v.* Machir, 18 W. Va. 271 (1881).

b. A bank continues in existence until its charter has expired or it has suffered a forfeiture, or a judgment of dissolution has been ordered against it.[10] After its existence is once proved the presumption is that it continues to exist, and the court will take judicial notice that a national bank is chartered for twenty years, but it will not take such notice that its existence is extended at the expiration of the twenty years.[11] But one who executes a mortgage to a bank after the terms of its corporate existence has expired is estopped to deny that it had no such existence when the note and mortgage were executed.[12]

§ 15. **The Ancillary Powers of the Bank.** — The powers of a bank may be conveniently divided into powers of doing business (see § 44), and those subservient to business, or ancillary powers.

[9] Haas *v.* Bank of Commerce, 41 Neb. 754, 60 N. W. 85 (1894); Davis *v.* Nebraska National Bank, 51 Neb. 401, 70 N. W. 963 (1897); Agnew *v.* Bank of Gettysburg, 2 Harr. & G. (Md.), 478; First National Bank of Clarion *v.* Gruber, 87 Pa. St. 468. In the latter case the court refused to take notice of the charters of State banks as authorizing them to charge a higher rate of interest than the ordinary rate, but said that a bank charter is a private act, and must be pleaded and proved like other private acts, and the national bank basing its claim to charge a certain rate on the existence of said charters must prove them.

Where to suit by a corporation the general issue is pleaded, the corporation must prove its legal existence. In New York it was held that even the Bank of the United States was not entitled to be excepted from this rule. United States Bank *v.* Stearns, 15 Wend. (N. Y.) 314. But this requirement has since been dispensed with in New York by special statute (2 R. S. 458, § 3). Bank of Genesee *v.* Patchin Bank, 3 Kern. (N. Y.) 309.

Where a suit to recover upon worthless bills, which have been issued by a banking corporation, is brought against those who are alleged to have been the officers and directors of the corporation, the charter must be proved, if its existence is necessary to make the bank a corporate body. Gardner *v.* Post, 43 Pa. St. 19.

In Nebraska parol testimony was held admissible in showing corporate existence. Shabata *v.* Johnston, 53 Neb. 12, 73 N. W. 278 (1897).

And in Washington it was held that acceptance of a charter of incorporation might be shown by user. Lancaster Savings Bank *v.* Elwell, 17 Wash. 446, 49 Pac. 1070 (1897).

See Chicago State Bank *v.* Carr, 130 N. C. 479, 41 S. E. 876 (1902), where the existence of a corporation was proved by a certified copy of its amended charter.

[10] Wilson *v.* First State Bank, 77 Kan. 589, 95 Pac. 404 (1908). See also State *v.* Barkman, 91 Ohio St. 248, 110 N. E. 540 (1915); *In re* Union Bank, 147 App. Div. 593 (1911), 133 N. Y. S. 621; Campbell *v.* Watson, 62 N. J. Eq. 396, 50 Atl. 120 (1901)

[11] Yankton National Bank *v.* Benson, 33 S. D. 399, 146 N. W. 582, 1916B Ann. Cas. 1011, n.

[12] Citizens' Bank *v.* Jones, 117 Wis. 446, 94 N. W. 329 (1903).

The latter powers or rights are, to have perpetual succession under a special denomination and artificial form, to sue [0] and be sued in the corporate name, to have a corporate seal, to appoint officers and agents (§ 16), and take bonds for their good behavior (§ 17), and to make by-laws for the government of its affairs and the conduct of its members and officers (§ 43).

These are all powers *inherent* at common law in every corporation, but are usually expressly conferred in the organic law (see II. § 8).

And express power is usually given in the organic law to increase or reduce the capital stock within certain limits, which is an express ancillary power.[1]

§ 16. **The Apppointment and Qualification of Officers** are generally provided for in the charter; usually, the directors [1] are chosen annually by the stockholders, and are removable by a special meeting of the shareholders for that purpose. The directors must have certain qualifications [1] of citizenship, residence, and ownership of shares in the bank. Once properly elected they hold office till their successors are elected,[2] or until they are disqualified, or they or the corporation die, or the time for which they were elected expires.

Term of Office

The directors elect one of their number president, and appoint a cashier,[3] and such clerks, tellers, and other officers as they deem

[0] § 15. A bank whose chartered period of existence has not expired and which has not been dissolved, may sue on a note even though it has voluntarily proceeded to wind up its affairs as a bank, surrendered to the bank commissioner its certificate to transact business as a bank, paid all its depositors in full and ceased to transact any business as a bank. Wilson *v.* First State Bank, 77 Kan. 589, 95 Pac. 404 (1908).

[1] The R. L. of Mass. c. 115, § 8, as provides for increase of capital by three-fourths vote of stockholders. For increase and reduction of capital of national banks when provided for in articles of association and approved by comptroller, see Part II. § 13.

[1] § 16. In Massachusetts seven to twelve directors; each must have five shares at least, be a citizen of Massachusetts and resident there, not a director in any other bank, and a majority of them must reside or have their places of business in the county of the bank, or within ten miles of the bank. R. L. c. 115, §§ 17, 18. National bank, see Part II. § 9.

[2] Part II. § 10, settles the tenure of office of national bank directors: they hold for one year plus any further time passing before their successors are elected and qualified, unless sooner disqualified, removed, etc.

The term of office of a director in a bank organized under the Massachusetts statutes is one year. R. L. c. 115, § 19.

[3] In Massachusetts the cashier cannot be a director of the bank in which he is cashier. R. L. c. 115, § 29.

proper for the business of the bank.[4] The term of office in these cases may be fixed by the organic law, or the by-laws, or by vote of the corporate government; but unless limited, the officer holds until a successor is elected, or he is removed, or dies, or is disqualified, or the bank ceases to exist, as, for example, by expiration of charter.[5] But the fact that the directors are by the charter to be annually elected, and that they have the appointment of the cashier, does not of itself make the office of cashier annual,[6] nor does a mere habit of the directors to re-elect every year make the office an annual one, so as to expire before a successor is elected and qualified.[7] Of course, where the directors' office is annual and the president is one of them, his office also is annual.

Bond

Whether required [8] by the organic law or not, it is usual to secure the bank by requiring the cashier and subordinate officers to give a bond for the faithful discharge of official duty, and as this is one of the points around which the cases cluster, we will devote a chapter to it.

[4] These officers are removable by the appointing power. They are the servants or agents of the corporation and not of the directors. Delvin *v.* Moore, 64 Or. 433, 130 Pac. 35 (1913).

[5] But the charter period may expire, and yet the bank not cease to exist; for the legislature may prolong its life, and then the tenure of office may not be broken by arrival of the limit first set. Exeter Bank *v.* Rogers, 7 N. H. 21. See § 27.

[6] Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 413.

[7] Amherst Bank *v.* Root, 2 Met. (Mass.) 522.

[8] R. L. of Mass. c. 115, § 27, requires a bond not less than $20,000 of the cashier. See Part II. § 8.

CHAPTER III

OFFICIAL BONDS AND LIABILITIES OF SURETIES

§ 17. General rule and difficulties stated.
§ 18. Defences, analysis of.
§ 19. Form and requisites.
§ 20. Delivery and acceptance.
§ 21. Fraud or illegality at inception.
§ 22. Do not cover loss by act of other than the officer, as by theft.
§ 23. Or loss by innocent mistakes.
§ 24. Negligence of officer.
§ 25. Exceeding his authority.
§ 26. Unusual duties given him. See § 17 *a*.
§ 27. Period covered by the bond.
§§ 28–32. Change in circumstances affects risk. See § 17 *a*.
§§ 33, 37–41. Misconduct and negligence of bank or other officers. See § 17 *a*.
§ 34. Satisfaction of bank's loss.
§ 35. Statute of limitations.
§ 36. Revocation by surety.
§ 42. Evidence. Measure of damages. Pleading and practice.
§ 17, n. 3. Construction.
In general.
§ 24. "Well and faithfully", "well and truly", to discharge.
§ 24. (Penn.) "Well and truly to perform duties to best of his abilities."
§ 23. "Deliver to his successor all moneys", etc.
§ 26, n. 0[a]. "Perform all duties of office which the directors may prescribe."
§ 25. (Va.) "Faithful discharge of the trust reposed in (him) as assistant bookkeeper."
§ 41. Express stipulation of the maximum sum to be intrusted to clerk.

§ 17. **Bonds. — Power to take. — Purpose. — Summary of Chapter.** — The custom of requiring bonds from the various officers may probably be considered as universal among banking institutions. Usually they are taken only from the executive officers; most frequently from the cashier and tellers, sometimes from the bookkeepers; and there are instances, though these are compara-

tively rare, in which they have been taken even from the president and directors.

The power to take official bonds is inherent in every corporation independently of statute.[1]

The purpose [2] of the bond is not penalty, but indemnity against loss by fault of the officer, in the transaction of the business of his office, or by reason of the opportunities it affords him. It is not for the benefit of the bank but for the benefit and protection of the public.[2a]

The questions arising on the execution, delivery, acceptance, construction,[3] and revocation [4] of bonds, and in relation to the dis-

[1] § 17. The National Banking Act, § 8, declares that the association "may elect or appoint directors, and by its board of directors appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them, and fix the penalty thereof" etc. It is evident that this gives no right to the association to require bonds of a director, at least unless he shall also fill some other office. But this does not render the taking of a bond from a director illegal; nor does it prevent such a bond from being valid at common law. It only deprives the bond of a statutory character, which is an insignificant loss, inasmuch as it seems to be attended by no very definite practical advantage. The power to take official bonds is inherent in every corporation, independently of statutory permission; and the permission or the command to take them from any particular officers cannot be construed to preclude the power of taking them from others also. Bank of Northern Liberties *v.* Cresson, 12 Serg. & R. (Pa.) 306.

It is clear also that a bond may be void as a statutory bond, by reason of variance from the requirements of the statute under which it purports to be drawn, and yet be valid as a common law bond. See § 19.

[2] See measure of damages, § 42.

[2a] Watertown Sav. Bank *v.* Mattoon, 78 Conn. 388, 62 Atl. 622 (1905).

[3] Most of the matters treated in this chapter are questions of construction. No particular form of words is necessary to be observed in the contract of suretyship, and, in its construction, there is no reason why courts should not be governed, as in all other contracts, by the rule that the actual intention of the parties must prevail. Fink *v.* Farmers' Bank, 178 Pa. St. 154, 169, 35 Atl. 636. So where a bond is susceptible of two constructions, one favorable to the bank, and the other to the surety, the former, if consistent with the purpose of the bond, must be adopted, especially where the bond is drawn by the surety. American Surety Co. *v.* Pauly, 170 U. S. 133, 144, 42 L. ed. 977, 982, 18 Sup. Ct. 552 (1897). And where the bond is inartificially and clumsily drawn, so that the careless collocation of inconsistent words would lead to absurdities if a literal construction were attempted, the court will revise and correct the language so as to render it conformable to reason. Planters & Merchants' Bank *v.* Hill, 1 Stew. (Ala.) 201.

The phraseology of the bond, upon which the litigation in the cited case arose, furnishes a fair example of the method of application of this rule. The condition of the bond was that the cashier should "with fidelity, punctuality, and attention, to the best of his skill, judgment, and ability,

charge of sureties by fraud, or misconduct of the bank, or officers other than the one guaranteed, can be very conveniently grouped under the various defences a surety may make, adding in our notes a few points in reference to evidence, measure of damages, and pleading and practice in general.

a. **Liability of a Surety.** — Express words may insure against even innocent mistake or accident.

But in the case of an ordinary bond for the faithful discharge of the duties of a certain office, C., by a certain person, O., the surety is liable for all loss *caused* by the *dishonest* or *incompetent* [5] (unless this is excluded by the language of the bond) conduct of O. in the *sphere* of said office (including such slight variations [6] and temporary substitutions as are likely to occur in the ordinary course of business), or by his taking *advantage of the opportunities* [7] *of his employment in such office* to commit a criminal or tortious act, during the time [8] he lawfully holds such office under the election to which the bond relates.

But difficult questions arise. Suppose the directors [9] order O. to do a wrongful act, from which loss results to the bank, or by

conduct himself in said office well and truly, discharging all its duties, executing the orders of the directors of said bank, safely and securely keeping all moneys deposited in his hands", and doing a great multiplicity of other "duties, acts, and things", "all and singularly", according to the descriptions contained in several more adjectives and adverbs. The writer of the bond was evidently floundering in a sea of words, and the court was obliged to come gallantly to the rescue. They declared that it was evident, from the very nature of the language, that it was not intended to apply all the restrictions to each particular duty; but that an intelligent apportionment should be made of the various expressions among the divers "duties, acts, or things" respectively, as from their several natures they might be susceptible of the qualifications mentioned. Thus "punctuality" could hardly be called for in "keeping" but rather in "accounting for" or "paying over" money. On the other hand, "judgment and ability" might be required in "keeping", and "skill" in "accounting", but neither of these qualities could be of much assistance in the business of "paying over." The surety will never be held to guarantee the performance of the duties of a public office in a manner either absurd or impossible, simply because an awkwardly phrased bond would subject him to this obligation if an effort were made to construe it strictly according to its wording.

A bond conditioned that the bank should keep "all said sums so deposited, or to be deposited as aforesaid" implies that a deposit had already been made and that the sureties were liable for its safe keeping as well as for the safekeeping of subsequent deposits. Kephart *v.* Buddecke, 20 Colo. App. 546, 80 Pac. 501 (1905).

[4] See § 36. [5] § 24. [6] § 26.
[7] § 25. [8] § 27. [9] §§ 37, 33.

their negligence or connivance give him the opportunity for wrong, is the surety discharged? It may be said the bank intrusts its business to the directors, and their acts bind it, and others prejudiced by their conduct are not to be held by the bank. The answer is, that the directors are not intrusted to do wrong, and that the surety does not have to bear loss caused by them but by O., whom he has guaranteed, and the fault of any other officer cannot[9a] make O.'s wrong less a breach of his bond. If the *stockholders themselves are guilty* of wrong, that would be a different question; they are the real principal[9b] on the bond, and such conduct would be a fraud on the surety that ought to discharge him.

Suppose again that O.'s salary is increased or diminished, or the bank's capital is raised, or O. is given duties outside the sphere contemplated in the bond as above. How shall these things affect the obligation?

Change of Officers' Duties

On principle it would seem clear, 1st, that if the loss *is caused* by the employment of O. out of his sphere, the surety is not liable, and to this the cases agree;[10] 2d, that if it can be clearly shown that the extra duties had nothing to do with the loss, but that it

[9a] A bond would be of little value were the law otherwise. Suppose M. employs A. as a manager and B. as cashier, and D. is surety for both. If either A. or B. makes default, he is liable to M.; but if A.'s fault, giving B. opportunity for wrong, is to relieve the surety, then he is liable only on one bond, though both are broken. If B. defaults, S. is liable; if A. defaults, S. is liable; but if they put their heads together he is only liable for one of them. Or, if D. insures B., and C. insures A., in case of fault of A. giving C. his opportunity, only C. would be liable. This seems a good deal like saying two wrongs together against the same person make one of them right.

Again, suppose the manager comes to know the cashier is stealing, and he buys silence. Can the cashier, the principal on his own bond, take advantage of his own wrong to deny his liability on the bond to M.? And if the principal is liable on the bond, is not the surety?

As to third persons generally, who are injured by the negligence or misconduct of the directors in the business intrusted to them, the bank is liable; but when a person has made an express contract, the very purpose and nature of which is inconsistent with the idea of holding the bank to such responsibility, the case fronts about.

[9b] Any fraud or improper conduct of the creditor or obligee will discharge the surety. Ham *v.* Greve, 34 Ind. 19; Franklin Bank *v.* Cooper, 36 Me. 179.

[10] §§ 30, 26.

was caused by O.'s conduct in the sphere of the office C., or by a wrongful advantage of the opportunities afforded by that office, the surety should be held, for it is a loss within the bond (unless of course there is an express provision that extra duties shall avoid the contract).

To this second proposition the cases do not assent[10] *if the duties are of a higher grade* (*i.e.* require more skill, or put the officer under greater temptation) than those of the bonded office. In such cases the increase of risk avoids the bond. The surety has a right to judge of the circumstances under which he is willing to be liable, and any change of the risk without his consent discharges him, unless unsubstantial or clearly for his benefit.

It may, however, be strongly urged that justice only requires that the burden of proof should be thrown upon the bank in such cases to show clearly that the loss was not in consequence of the change. In most cases the two rules would produce identical results, as it would usually be impossible to disentangle the influences producing the officer's default, and on the broad consideration of practicality the rule of law is perhaps the best, as preventing troublesome inquiry in favor of one who has by his own act put a cloud upon his rights. The analogy of goods mingled by negligence or wilful act is against the rule of law here, for the owner can claim the goods if he can clearly distinguish them.

The ground for holding the surety discharged is, that the cause of loss may be conduct outside the bond, and if this can be successfully rebutted the ground fails. Nor does the rule of law seem necessary to prevent fraud, for the burden of proof would do that as well; however, as the law is well settled and known, it can work little injustice.

It might be urged that, as the fault of directors cannot discharge the surety, the addition of higher duties by the directors should not; but the reason of release of the surety is that the cause of loss may be outside the bond, and this reason is not touched by any consideration of the manner in which O. came to act beyond the office C.

Increase of Capital or Salary

As to the increase of capital,[11] the arguments are about balanced as to whether it is an enlargement of risk fairly to be presumed within the contemplation of the bond, or not.

[10] §§ 30, 26. [11] § 32.

But the diminution or increase of salary[12] is so ordinary a matter, so naturally to be expected, and of so little importance to the risk, as to seem clearly of no effect, though it has been held otherwise.

§ 18. **Defences.**

(a) That the bond never took effect.
  (1) Formal requisites absent. § 19.
  (2) No delivery and acceptance. § 20.
  (3) Fraud or illegality in its inception. § 21.

(b) That the loss is not of a nature covered by the bond.
  (1) Loss by theft, robbery, unavoidable accident, or other cause not involving fault of the officer (O.) guaranteed. § 22.
  (2) Loss by innocent mistake of O. § 23.
  (3) Loss by conduct of O., below the line of ordinary skill, competency, and care. § 24.
  (4) Loss by act of O. in excess of his authority. § 25.
  (5) Loss by O. in performing extra and unusual duties, or such as do not pertain to the sphere in which he was guaranteed. § 26.

(c) That there was no act of O. of a nature to create liability of the sureties occurring within the *period* covered by the bond. § 27.

(d) Discharge of the surety.
  (1) By a *material change* not contemplated in the contract, as changes in the banking firm, in the duties of the officer, increase of capital stock or of the officer's salary. §§ 28–32.
  (2) Misconduct of bank in keeping O. after discovery of his dishonesty. § 33.
  (3) Satisfaction of the bank's loss. § 34.
  (4) Statute of limitations. § 35.

(e) Revocation previous to the wrongful act of O. § 36.

No Defence.

(a) That the dishonest, improper, or irregular act of O. was done under authority from the directors. § 37.

(b) Nor that the bank was negligent in not discovering previous defalcations of O. § 38.

(c) Nor that the signature of another surety was fraudulently obtained. § 21.

[12] § 31.

(d) Nor that a greater sum was intrusted to O. than the limit set in the bond. § 41.

(e) Nor that the bank has failed to perform public duties, or done business contrary to its charter. § 39.

(f) Nor that the officer failed to take the oath required by statute. § 40.

§ 19. **Form [1] of the Bond.** — The National Banking law (II. § 8) does not specify the terms of the bond, and the State statutes [2] generally have few provisions on the subject. As a rule, any condition in the bond, consistent with its character as a guaranty that the officer shall perform his contract, and not in contravention of law, morals, or public policy, will be sustained.

Statutory Bond

When there are statutory provisions to which the bond fails to conform, it may still be good as a common law bond, unless the legislature has declared that bonds not in accordance with the statute shall be void.[3]

Although both in its form and in its execution it should differ very materially from the special regulations prescribed in the charter or statute in accordance with which it purports to be

[1] § 19. *Bond in name of Officers.* A bond running to the president and directors, without addition of the corporate name, will be regarded as a valid bond to the corporation, and may be sued by the corporation. Pendleton *v.* Bank of Kentucky, 1 T. B. Monr. (Ky.) 171.

Blanks unfilled. If after an official bond is duly signed, executed, and delivered to the proper officer by the principal and the sureties, it is found that the blanks in the body of the instrument, which were left for the names of the sureties, have been accidentally left unfilled, the bank has authority to insert the names. Hultz *v.* Commonwealth, 3 Grant (Pa.) 61.

Date. Where the date of the bond is "the —— day of ——, 1869", the legal presumption is that it took effect on the last day of that year. Graves *v.* Lebanon National Bank, 10 Bush (Ky.) 23.

[2] In Massachusetts the cashier's bond is to be "conditioned for the faithful performance of his duties", and in no case for less than twenty thousand dollars. R. L. c. 115, § 27.

In Indiana the bond of the president and cashier are "conditioned that they will honestly and faithfully discharge their several duties" with the sum to be fixed by the board of directors, § 3331 Burns 1908, § 2686 R. S. 1881. Acts 1873, p. 21, § 3; United States Fidelity etc. Co. *v.* Poetkre, 180 Ind. 255, 102 N. E. 372 (1913).

[3] Bank of Brighton *v.* Smith, 5 Allen (Mass.) 413; Bank of Northern Liberties *v.* Cresson, 12 Serg. & R. (Pa.) 306; Franklin Bank *v.* Cooper, 36 Me. 179; Gathwright *v.* Callaway County, 10 Mo. 663; The Governor *v.* Allen, 8 Humph. (Tenn.) 176; State Bank *v.* Locke, 4 Dev. (N. C.) 529; Bank of Carlisle *v.* Hopkins, 1 Monr. (Ky.) 246; Morse *v.* Hodsdon, 5 Mass. 314; Burroughs *v.* Lowder, 8 *id.*, 373; Sweetser *v.* Hay, 2 Gray (Mass.) 49; Grocers' Bank *v.* Kingman, 16 Gray (Mass.) 473.

drawn and executed, nevertheless, as a contract voluntarily entered into, upon sufficient consideration and for a perfectly legal purpose, it remains obligatory upon the parties, independently of the statute. Where the bond differs from the statutory form only in setting forth a greater number of requisitions to be complied with by the officer, if they are severable, those of them which are not called for by the statute may be rejected as surplusage.[4] This would render the bond good under the statute, but nothing would be practically gained by it. For without the severance and rejection the bond would still have been good in its original shape at common law. The operation of this latter doctrine can be prevented only by the express legislative enactment that a bond taken in any other form shall be void. No less positive language can be substituted for this explicit declaration with the like effect. The words used may amount to a prohibition against the officer's entering upon the discharge of his office until he has given such a bond. Still the bond in the different shape will remain good. It was urged in the Brighton Bank case, cited in note 3, that the bank could not recover because it could not make out its case except by proving and relying upon an illegal act. But the court very clearly showed the fallacy of this argument, even if it were assumed that the statute were to be construed as a prohibition on the bank directors, restraining them from permitting the cashier to act as such till he had given the prescribed bond. Still, the bank proved no illegal act or omission to support their case. In the taking of the bond in question there was no violation of law. The only possible fault lay in the omission to take another bond. But the omission to do something else did not necessarily vitiate that which was done. The bond taken was not prohibited by statute; both might have been legally taken, and both or either must be valid.

§ 20. **Delivery and Acceptance.** — At common law no vote or record of acceptance is necessary; parol evidence of any circumstances that would raise a presumption of acceptance in the case of an individual is sufficient; but statutes or charter may require the bond to be "approved" or "accepted" by the directors, or "by vote of the directors", or that it shall be "to the satisfaction of the directors." In all cases parol will be admitted to prove circumstances from which the required approval can be inferred;

[4] Shunk *v.* Miller, 5 Barr (Pa.) 250; Walker *v.* Chapman, 22 Ala. 116; Woods *v.* State, 10 Mo. 698.

mere possession by the bank of a paper like this, intended for their benefit, is good evidence of acceptance. When directors are themselves sureties, see § 21 *a*.

The form of the bond and the sufficiency of the sureties offered upon it ought of course to be considered and passed upon by the responsible government. But where an express legislative command is laid upon them to do so, it has occasionally been set up in defence to suits upon bonds, either that the directors had not "accepted" at all, or had not accepted "by vote"; or that there is no proper and admissible evidence of their having done so. This ground was first taken in the case of the Bank of the United States *v.* Dandridge.[1] At the trial of that cause the plaintiffs undertook to prove that the bond on which they sued fulfilled the requisitions of the charter, — that it should be "to the satisfaction of the directors", — by offering in evidence the fact of its being in their possession, and by other such presumptive evidence as would suffice to raise the legal presumption if the bank had been an individual. The defendants objected that this evidence was inadmissible, or, even if admissible, would not be sufficient; that corporate acts must be proved by corporate records and minutes of proceedings, and since these were altogether silent on the subject of the bond, its acceptance and approval, as required by the law, must be conclusively assumed never to have taken place, and could not be shown by other and parol testimony. When the case was tried before Chief Justice Marshall in the Circuit Court, he adopted the views of the defendants' counsel; but when it came before the full bench, they reversed his decision. A long opinion, intended to be exhaustive, was delivered by Judge Story, to the effect that the acceptance and approval might be proved by testimony *dehors* the corporate records, and might be presumed in favor of the bank, as matter of law, from proof of the same facts which would suffice to raise the same legal presumption in favor of an individual. Chief Justice Marshall, adhering to his original views, delivered a dissenting opinion. But the decision of the associate justices of course settled the law.

While the case was pending, after the ruling in the Circuit Court and before its reversal had been pronounced, a like case came before the Supreme Court of Massachusetts. The records of the bank in this case, however, showed that J. S. B. and W. D. "be accepted as sufficient sureties in a bond *to be given* by the

[1] § 20. 12 Wheat. 64, 6 L. ed. 552.

cashier", etc. Chief Justice Parker delivered the opinion. He expressed surprise at the ruling of Chief Justice Marshall in the Circuit Court, above stated, saying, "We should have supposed that, in the case as well of a corporation as of an individual, a paper intended for their benefit, and found on their files, would be considered as having been accepted by them." But without touching this principle, in this cause, "the vote to accept the sureties, and the bond's being in the possession of the president, are a sufficient acceptance of the bond." [2] Several years afterwards the same court again held that parol evidence was admissible to show that the bond had been laid before the directors, and that they had expressed themselves satisfied with it, and that this was in law equivalent to a formal acceptance.[3] The same doctrine was maintained to its full extent in Maryland.[4] It can no longer be considered to be open to question. The fact of the possession by the bank of a bond in due form, legally executed, and complete in every respect, the officer having been allowed to enter upon his duties, is evidence which by itself will suffice to authorize a suit upon it as having been delivered and accepted with all requisite formality.[5] And where an officer makes no formal delivery of a bond in which he is principal, but retains it among other papers of which he is general custodian, it may be found that he holds it on account of the bank as its property.[6]

§ 21. **Fraud or Illegality in the Inception of the Bond.** — A bond is void, if illegal, as when given by a director in a State where directors are forbidden to be sureties on the bond of an officer of their own bank; or if tainted with fraud, as when the sureties are misled by intentional or careless *misrepresentations* of the directors,[0] or by their *concealment* of facts which they know

[2] Dedham Bank *v.* Chickering, 3 Pick. (Mass.) 335.

The fact that the bond of the assistant cashier was delivered to the cashier of the bank, who was one of the directors, and that the assistant cashier entered upon the duties of his office under such bond, and that such bond was retained by one of the directors of the bank is sufficient to establish the acceptance of the bond, though no acceptance is shown by the minutes of the board of directors. Fiala *v.* Ainsworth, 63 Neb. 1, 88 N. W. 135, 93 Am. St. Rep. 420 (1901).

[3] Amherst Bank *v.* Root, 2 Met. (Mass.) 522.

[4] Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324.

[5] Graves *v.* Lebanon National Bank, 10 Bush (Ky.) 23; Bostwick *v.* Van Voorhis, 91 N. Y. 353, quoting the words of the text substantially.

[6] Johnson *v.* Gerald, 169 Mass. 500, 502, 48 N. E. 764 (1897).

[0] § 21. Bank of Hardinsburg *v.* American Bonding Co., 153 Ky. 579, 156 S. W. 394 (1913).

increase the risk.[0a] But it is held, as we shall see, that directors are not bound to disclose facts which do not affect moral character or official integrity.

It is a general principle of guaranty that non-disclosure of the falsity of facts on belief of which the obligee knows the surety is acting discharges him. We should say, the concealment by the directors of *any* facts, *material*, and *peculiarly within their knowledge*, is fraud;[0b] if the bond only covers losses by dishonesty, facts not affecting integrity are not material, but if the surety is responsible for losses by negligence, then facts which increase the risk of loss by negligence in an important[1] and substantial manner are

[0a] There must be entire good faith in the transaction between obligee and surety; any taking advantage of the surety by withholding proper information will avoid the contract. Story's Eq. Juris. § 324.

[0b] If untrue statements are made relative to material facts, and the directors knew they were untrue or failed to make proper effort to inform themselves thereof, the bond is invalid. Ætna Indemnity Co. *v.* Farmers' National Bank, 169 Fed. 737 (1909); and evidence should be admitted to show that the cashier who made a false certificate that the president "has performed his duties in an acceptable and satisfactory manner, and we know of no reason why the guaranty bond should not be continued" in response to questions from the Surety Co. addressed to the bank, did so with the instructions or knowledge of the directors. Fidelity etc. Co. *v.* Courtney, 186 U. S. 342, 46 L. ed. 1193, 22 Sup. Ct. 833 (1902).

[1] Matters which, though affecting the risk, do so in a trivial and unimportant manner, or are remote and do not necessarily affect the risk, though it is conceivable they may, or such matters as are within the contemplation of every reasonable man, as the slight variations of prudence, care, and intellect among ordinary men, are not deemed material. If an officer already in the directors' service is re-elected, they are not bound to state to his sureties, offered upon his new bond, that he is careless, negligent, stupid, or a poor and inaccurate accountant. They are not obliged to state that they themselves have been remiss in examining into the condition of the bank, the amount of its funds on hand, and the correctness of its accounts. Neither need they state the existence of other and prior bonds, even though they may be still in force. But if they know that there is in fact a defalcation existing which will be covered by the terms of the proposed bond, they are bound to state it, and their failure to do so is such a breach of good faith on their part as will invalidate the contract. Even where a party offered as bondsman had been a director in the bank itself at the time the defalcation took place, and ought therefore from the nature of his official duty to have been aware of it, it was held that the obligation of his bond could not be enforced against him, if he should show that as matter of fact he did not know it; that his co-directors had carefully concealed it from him up to and after the time of his executing the bond, and apparently with the very object of leading him to execute a bond which would by its terms cover it. Franklin Bank *v.* Cooper, 36 Me. 179; 39 *id.*, 542; Franklin Bank *v.* Stevens, 39 *id.*, 532; Smith *v.* Bank of Scotland, 1 Dow, Parl. R. 294. The essence of the matter seems to be, that the sureties, unless informed to the contrary, have a right to suppose that their

material, and if the directors know such facts [2] by reason of the special opportunities of observing the officer that his past employment has afforded, they should be disclosed. Receiving a guaranty from G. knowing facts which G. does not know, and has not had opportunity to know, and which it is reasonable to suppose might, if known to him, deter him from giving the guaranty, is a fraud by all the analogies [3] of the law, as well as by the judgment of morality.

Of course fraud on one surety does not affect the liability of co-sureties, with whom the dealings were strictly in good faith.[4]

We will now more fully consider the points thus briefly stated.

a. **Can a Director be a Surety?** — The first question which presents itself is whether a director can be a surety upon the bond of any officer of his own bank. In *some States this has been forbidden by legislative enactment. But it is not thus forbidden by the National Banking Act; and when not forbidden by statute, it cannot be said to be absolutely illegal.* The law and the morality are both so very neatly put by Chief Justice Shaw that we are tempted to give his own words: "The next exception is, that the bond was void, as against the policy of the law, because three of the directors, whose duty it was to examine and approve the cashier's

undertaking is in the ordinary course of business, similar in all material respects to other like undertakings, and exposing them to no peculiar and hidden risks.

[2] For example, such *marked* and *unusual* carelessness or stupidity as to make it unreasonable to suppose the surety would guarantee one so wholly incompetent, and so exceedingly likely to involve him, if he was in possession of the facts known to the directors.

[3] If the fraud be such that without it the contract would not have been made, it is material; but if it is probable the same thing would have been done in the same way without the deceitful conduct, it is not material. 2 Parsons on Contracts, 267. The insured must state all facts within his knowledge which would have an influence on the terms of the contract, and are not known, or may be supposed by him not to be known, to the insurer. Lindenau *v.* Desborough, 8 B. & C. 586; Bufe *v.* Turner, 6 Taunt. 338; Clark *v.* Man. Ins. Co., 8 How. 235, 12 L. ed. 1061; New York Bowery Ins. Co. *v.* New York Ins. Co., 17 Wend. (N. Y.) 359; Fletcher *v.* Commonwealth Ins. Co., 18 Pick. (Mass.) 419. See also Benj. on Sales, § 461, and Kerr on Fraud and Mistake; also Maynard *v.* Maynard, 49 Vt. 299; Bruce *v.* Ruler, 2 M. & R. 3; Hill *v.* Gray, 1 Stark. 434.

[4] See cases cited in note 1 to this section. If, however, the obtaining of A.'s signature is the condition of B.'s signing, and A.'s name is fraudulently obtained, B. cannot be held. Franklin Bank *v.* Stevens, 39 Me. 532. But a surety signing with the understanding that others would sign is not relieved if they do not sign unless the company is notified thereof. Johnson County *v.* Chamberlain Banking House, 80 Neb. 96, 113 N. W. 1055 (1907).

bond, were themselves his sureties. This exception certainly comes with a very bad grace from those directors who thus became sureties. It sets up the dereliction of their duties as directors, to avoid their obligation as contractors. It may have been in very bad taste, it may have been very indiscreet and ill-judged, to put themselves in a situation to express an opinion on their own sufficiency as such sureties. But whether right or wrong, it is impossible to perceive how the obligors, either such directors themselves, or their co-obligors, can avail themselves of this circumstance to avoid their obligation. Another objection . . . was, that if directors, so being sureties on the deed, could approve or accept the deed, it was in effect a contract with themselves, and of no binding effect. . . . Here the corporation is an artificial person in law, distinct from all the individuals composing it, capable of contracting and bringing suits, and may contract with its own members, or have suits against them, as well as against any other persons." [5]

In Maine the State banking law provided that the bond should not be " signed " by a director. But on the ground that the bond was not operative or valid till it had been accepted, it was held that if the signer was, at the time of signature, a director, but had ceased to be so at the time of acceptance, there was no violation of the statute.[6] It was held in another case that the same law would invalidate an obligation, and a mortgage security accompanying it, given by a director to third parties to indemnify them against loss as sureties upon an official bond, the object being to induce them to become such sureties.[7]

b. **Misrepresentations.** — Where an embezzlement by a cashier had occurred, and might have been discovered by a very limited measure of diligence on the part of the directors, and they yet failed to detect it, and published a statement of the affairs of the bank, going to show a faithful and careful management and proper condition of its affairs, and two persons, having read this statement, became sureties on the cashier's bond, it was held, in Kentucky, that they had a good defence to a suit against them to make good losses caused by his subsequent embezzlements,[8] and when

[5] Amherst Bank *v.* Root, 2 Met. (Mass.) 522.

In Snattinger *v.* Topeka, 80 Kan. 341, 102 Pac. 508 (1909), it seems to be assumed that a director may be a surety on the bond of a depositary bank, although the question is not specifically considered.

[6] Franklin Bank *v.* Cooper, 36 Me. 179.

[7] Jose *v.* Hewett, 50 Me. 248.

[8] Graves *v.* National Bank, 10 Bush (Ky.) 23.

the bank has been required to answer questions which answers are expressly made a condition precedent to liability on the bond the surety is not liable when the answers are false, and the statute declaring statements to be representations and not warranties does not effect the ultimate effect of a materially false representation.[8a]

c. **Concealment.** — In the case above cited of Franklin Bank *v.* Stevens, the sureties on a cashier's bond bound themselves by the language of the bond to guarantee, not only that the cashier should account for all money to be subsequently received by him, but also that he should account for all money previously received by him. It was held that evidence offered by the sureties of the unskilful and careless keeping of the books of the bank, of the negligence of the directors and the bank commissioners, and the non-existence of other bonds, all relating to the time prior to the date of the bond in suit, was immaterial, as having no bearing on the liability of the sureties. Though evidence tending to show knowledge, on the part of the bank officers, that property of the bank had been lost by the cashier prior to the execution of the bond, would have been competent, as having a direct bearing on the liability of the sureties.[9]

In Pennsylvania, a case arose where, at the time the sureties executed a bond for the teller, he had already defrauded the bank, though he had not been as yet detected or suspected by the officers. The defendant (the surety) sought to show in defence, that, if the officers had examined the books of the bank at the time of the giving of the bond, they would have been able to detect the then existing deficiency. The court said that a fraudulent concealment of the defalcation, at the time when the bond was executed, would have constituted a defence. But that there was no such concealment, since there was no such knowledge; that the "sort of

[8a] Warren Deposit Bank *v.* Fidelity etc. Co., 116 Ky. 38, 74 S. W. 1111 (1903). See United States Fidelity etc. Co. *v.* Citizens' National Bank, 147 Ky. 285, 143 S. W. 997 (1912), where the president of a "county bank" who was not an expert accountant stated to the surety company that the books of the cashier had been examined and found correct. See also United States Fidelity etc. Co. *v.* Foster Deposit Bank, 148 Ky. 776, 147 S. W. 406 (1912); United States Fidelity etc. Co. *v.* Boley Bank, 43 Okla. 819, 144 Pac. 615 (1914). United States Fidelity etc. *v.* Foster Deposit Bank's Receiver, 153 Ky. 698, 156 S. W. 371 (1913), holding that the directors must substantially comply with the requirement of examining the books, but that they are not required to make such thorough examinations as trained book-keepers would make.

[9] Franklin Bank *v.* Stevens, 39 Me. 532.

constructive notice" which the defendant sought to allege could not be permitted to be set up to defeat his liability; that the officers were under no obligation to investigate the books when the bond was given, and their failure to do so, and ignorance consequent upon such failure, constituted no basis for a defence in this suit. Though it was intimated that a different rule might have prevailed had the surety at the time requested an examination, and the request had been either refused or evaded.[10]

The directors knew of certain irregularities and omissions of O. while teller, but did not suppose them to affect his moral character or official integrity, and did not disclose them to the sureties on his bond as cashier. This was held no defence to a suit on the bond.[11]

In Connecticut it is not the duty of directors to disclose to sureties prior defalcations of a cashier.[12]

Loss not of a Nature covered by the Bond

§ 22. **Loss by Act of another than the Officer guaranteed.** — A loss of moneys or securities by reason of a theft or robbery, accomplished without the collusion of the officer, and not furthered or rendered possible by his negligence or incompetence, would be a good defence to a suit upon a bond written in any of the forms heretofore described.[1] The bondsmen are certainly not insurers against the acts of any person save the principal in the bond.

§ 23. **Innocent Mistake.** — The officer contracts for ordinary skill and prudence, and it is this the surety guarantees, and if a cashier causes loss by a mistake such as cashiers of experience are liable to make sometimes, it is not a loss for which the sureties are liable, unless the words of the bond are absolute, and expressly agree that the officer shall do certain specific things; in such case, if the officer fails to do these things, by mistake or otherwise, the surety is liable.

[10] Wayne *v.* Commercial National Bank, 52 Pa. St. 343.

[11] Bostwick *v.* Van Voorhis, 91 N. Y. 353. See United States Fidelity etc. Co. *v.* Citizens' National Bank, 147 Ky. 285, 143 S. W. 997 (1912).

But if the acts indicate fraud or dishonesty it is the duty of the bank officials to notify the surety thereof. National Council of Knights etc. *v.* Wilson, 147 Ky. 293, 143 S. W. 1000 (1912).

[12] Watertown Savings Bank *v.* Mattoon, 78 Conn. 388, 62 Atl. 622 (1905).

[1] § 22. Allison *v.* Farmers' Bank, 6 Rand. (Va.) 204; American Bank *v.* Adams, 12 Pick. (Mass.) 303; Planters & Merchants' Bank *v.* Hill, 1 Stew. (Ala.) 201; Mohrenstecher *v.* Westerreet, 87 Fed. 157.

But though an overpayment by mistake may be set up, and often successfully, in defence to a suit upon a bond, it is necessary that the officer should have acted honestly, not only in the transaction of overpayment, but equally in reference to all matters which, however remotely, concern it or are connected with it. If he subsequently commits any deceit or fraud, or makes false entries in the books, for the purpose of concealing the deficiency, his dishonest dealing in this particular will suffice, in the eye of the law, to give the coloring of guilt to the entire affair from the very outset. It may still remain true, that the actual loss of the money was caused wholly and solely by the innocent overpayment; and that the subsequent misconduct could not aggravate the injury, as subsequent misconduct could not have remedied it. Still the acts resorted to for securing concealment are a *suggestio falsi;* the concealment itself is a *suppressio veri.* Each is an unfaithfulness, and will, as a rule, be assumed to have contributed to the injury suffered by the bank.[1]

If the bond, instead of insuring honesty and competency in such general terms as are displayed in the foregoing instances, enumerates specific acts in distinct language, and guarantees that the officer shall perform these acts, the peril of possible mistakes in their performance, however innocent and excusable the error may be, is assumed by the obligors. A deliberate undertaking, for example, that the cashier shall "*deliver to his successor in office . . . all moneys, securities, stocks,* etc., etc.", is an absolute and unconditional guaranty for such delivery, and the fact of an innocent loss, growing out of an excusable mistake, cannot be availed of in defence to a suit for non-delivery.[2]

§ 24. **Negligence of the Officer.** — The officer contracts for reasonable skill and diligence, and the surety guarantees he will fulfil his contract unless he expressly narrows his engagement, and no words can be relied on to restrict the liability of a bank officer's bondsmen to mere personal honesty and integrity, unless these terms or their clear equivalents are used, and stated as the limits of the insurance.

If the officer's conduct is *above* the line of *ordinary* skill and care, as observed among persons of his class, the case comes under § 23; that is, where only such slight negligence attaches to the officer

[1] § 23. Union Bank *v.* Clossey, 11 Johns. (N. Y.) 182; Rochester City Bank *v.* Elwood, 21 N. Y. 88.

[2] State Bank *v.* Chetwood, 3 Halst. (N. Y.) 1.

as is to be expected of ordinary men in his position. This is the substance of the law of this topic, both on principle and authority.

Carelessness and Ignorance

Of course considerable variety is found to exist in the form and language of the bonds used by different corporations, and especially in those portions wherein is described the species of good and satisfactory conduct which is insured. Very commonly only general phraseology is used. It is stipulated simply that the officer shall "*well and faithfully*", or "*faithfully*", or "*well and truly*", discharge and perform his duties. Practically, it may be considered that these phrases are equivalent each to either of the others. For though a finical linguist might seek to draw some delicate distinction between the signification of the word "well" on the one side, and the words "faithfully" and "truly" on the other, yet such over-nicety is not encouraged by the law which has been laid down in the premises; and it is safe to say that these words may be used interchangeably. The better rule of construction, which is to be applied to all alike, seems to be that they are designed not only to guarantee honesty and obedience, but also reasonable skill, competence, and diligence. The reason for taking the bond is by no means limited to the narrow object of protecting the banking house only against loss arising from embezzlement or other species of criminal conversion and misappropriation, but also against the equally mischievous danger of carelessness, thoughtlessness, and ignorance.[1] The security for the "faithful discharge" of duties would be rendered "utterly illusory", if its import were to be narrowed to a guaranty against personal frauds only. Duties performed negligently and unskilfully, or violated from want of capacity or want of care, can never be said to be "well and truly" executed.[2] In Massachusetts a bond calling only for "faithful" performance was declared to bind the obligors, not only for the honesty of the officer, but also for his "faithful execution of the duties of his office, which embraces competent skill and due diligence."[3] It must certainly

[1] § 24. Rogers *v.* Kelly, 2 Camp. 123.

[2] Minor *v.* Mechanics' Bank, 1 Pet. 46, 7 L. ed. 47.

A surety is responsible for the negligence of a cashier, on a bond conditioned that he will honestly, faithfully, and efficiently perform his duties. Fiala *v.* Ainsworth, 68 Neb. 308, 94 N. W. 153 (1903).

[3] American Bank *v.* Adams, 12 Pick. (Mass.) 303.

When the assistant cashier believes that the cashier is taking money of

be considered that the last two cases, one of which was decided in the highest tribunal in the land, establish the correct rule of law. Yet in New York there is a well-known cause in which precisely the opposite doctrine was laid down. The bond of a teller was conditioned that he should "well and faithfully perform the duties", etc. The court declared that this was security solely for his honesty in his trust, and not for his competency.[4] Yet it is very curious to note that, though the conflict between the abstract statement of law in New York and in Massachusetts could not well be more direct and apparently irreconcilable, nevertheless both courts, having substantially like facts to deal with, might not improbably come to very nearly the same practical results. In New York, it was said that an overpayment by mistake, honestly made, was a matter of incompetency, and was not insured against in the bond. In Massachusetts, it was an obvious inference from the language of the court that, if the fact was that the deficiency was caused by an overpayment, made honestly and through a simple mistake, then evidence that experienced and able tellers were liable occasionally to make such mistakes would have been admitted for the purpose of showing that at least this fact did not of itself suffice to prove incompetence. It is not to be supposed that ample evidence of this description could ever be found inaccessible. Whence it might not improbably occur that, upon diametrically opposite doctrinal bases, the same conclusion of acquitting the sureties might be arrived at.

If the two above-cited decisions are the only ones which directly and in terms run counter to the New York decision, there is yet a decision [5] in the Pennsylvania reports which fails to do so only because it goes much farther, though in the same direction, than either the Supreme Court of the United States or the bench of Massachusetts. In this case the bond was conditioned that "J. B., the cashier, shall well and truly perform the duties of cashier of the bank aforesaid, *to the best of his abilities*." The italicized words certainly ought to have sufficed to exclude from the operation of the guaranty acts of simple incompetency or ignorance, if any language short of an exclusion in terms could do so. The defendant's counsel argued thus, and urged that the insurance of the

the bank without authority it is his duty to so report to the directors. Fiala *v.* Ainsworth, 63 Neb. 1, 88 N. W. 135, 93 Am. St. Rep. 420 (1901).

[4] Union Bank *v.* Clossey, 10 Johns (N. Y.) 271; 11 *id.*, 182.

[5] Barrington *v.* Bank of Washington, 14 Serg. & R. (Pa.) 405.

bond was restricted to the cashier's fidelity and honesty; the degree of his ability might be considered as expressly exempted, provided his best ability, such as it might prove to be, was uniformly used. Certainly these arguments were not devoid of force. The court complimented them as ingenious, but declared them unsound. The opinion held, substantially, that the covenant was that the cashier should discharge the duties of his appointment, that is to say, that he should do so with competent skill and ability. It was said that one who accepts an office or trust of any kind contracts to execute it with competent skill and ability; his sureties, who are bound that he shall execute it according to his skill and ability, warrant for the performance of this contract of the officer. His undertaking is to act according to the duties of his station. So, if by his act of honest intention, but in excess of his authority, the bank suffers a loss, it must be reimbursed by the obligors in the above bond.[6]

This is subtle and not altogether unanswerable reasoning. It proceeds on the basis of what it is supposed that the bond would naturally be designed to contain, rather than upon the basis of what it really does contain. There is a little confusion, moreover, between the undertaking of the cashier, implied by his entry into office, and that of the sureties, actually expressed in the instrument; between the liability of the cashier at common law, and that which exists under and by virtue of the stipulations of the bond. It is true that the cashier by the acceptance of the trust impliedly contracted to exercise it with due skill and ability; but it was *by the acceptance of the trust*, strictly and literally, and not at all by the execution of the bond, that he thus contracted. It is possible that his acceptance of office may have placed him under obligations greater than those named in his bond. But to say that the sureties in the bond, who defined in perfectly intelligible language the extent to which they consented to become guarantors, could have the same extended until it became commensurate with a liability of another person, their principal, rising from an entirely alien origin, seems to us hardly a tenable position. It is not a logical sequence, but a verbal illusion, to say that, because the cashier, by accepting office, binds himself to use due skill in its functions, therefore his bondsmen, expressly guaranteeing only that he shall use skill "to the best of his abilities", impliedly assume and guarantee that the skill thus described is due

[6] American Bank *v.* Adams, 12 Pick. (Mass.) 303.

skill. This is to read their contract by the light of his; to embody his individual and implied undertaking, arising from his individual act, into their specifically worded and independent undertaking; to substitute the measure which a legal implication applies to his contract for skill, in place of the measure which they in their contract have taken pains to provide in exact phraseology. But though the original soundness of this opinion may be thus criticised, yet it must be acknowledged to be the law. It has stood for long years unchallenged, and perhaps it would now be foolish to change it.

§ 25. **Loss occasioned by an Act of O. in Excess of his Authority.** — If an officer goes outside of his duties, as to take funds he had no occasion to touch, the better opinion is that the surety is bound, for the "faithful discharge" of his office implies that he shall not go outside of it, even though his intention is honest,[1] especially not to *use the opportunities it affords him* to embezzle the bank's funds, or defraud it. A case in Virginia, however, holds the contrary.

But O.'s act beyond authority must cause loss to the bank; if it is, for instance, an act of agency which does not bind the bank, no cause of action against the sureties arises unless the bank sees fit to *ratify* the act. We will now examine the cases and develop more fully the points thus briefly stated.

In Allison *v.* Farmers' Bank,[2] a Virginian bench held that the sureties on an accountant's bond were not liable for his theft of money from the teller's drawer, since his bond secured only his fidelity in the "office of accountant", and as accountant he was not put in possession of any money of the bank. This ruling seems thoroughly narrow and unsatisfactory; it was rendered only by a divided court, and has been deliberately overruled in New York in the case above cited, of Rochester Bank *v.* Elwood,[3] with the true criticism that its principle, if followed, would substantially cancel all official bonds. In this latter case, also, the bond specifically secured the faithful discharge "of the trust reposed in [the officer] as assistant bookkeeper." In this case, also, he embezzled funds which, in the strict performance of his duties, he had no occasion to touch, and then he made false entries in his books to conceal the fact. This last feature in the case gives rise to some remarks in the opinion not perhaps strictly bearing upon the precise point in discussion; but rather than mutilate, or give in

[1] § 25. See Barrington *v.* Bank of Washington, § 24.
[2] 6 Rand. (Va.) 204. [3] 21 N. Y. 88.

an imperfect shape, the reasoning of the court, we shall condense the whole. The judge said that, construing the instrument by the light of attendant circumstances, he did not think that the bond was limited to insuring mere fidelity in the actual bookkeeping. *The bookkeeper was in such close contact that he could easily abstract money*, and more easily than any one else could conceal the abstraction by falsifying his books. *These facts must be presumed to have been known to the sureties, when they guaranteed his faithful performance of a trust as an employee in the bank. It cannot be fairly supposed that they intended to guarantee only that he should keep the books correctly, but rather that he should be honest and faithful in his trust as an employee of the bank.* They engaged absolutely for his integrity and fidelity in the discharge of the trust of assistant bookkeeper. The bond indicated the department to which he was to be assigned, and guaranteed that he was a trustworthy person to discharge its duties. *His "faithful discharge" of the trust implies an engagement that he shall not transcend it to embezzle. If he does transcend it, and uses the opportunities it affords him, for the purpose of stealing, it is not a "faithful discharge."* Therefore he is liable for the abstraction, *per se*. But especially would he be liable if the false entries were concurrent and simultaneous with, and a part of, the guilty *res gestæ*. A liability which would clearly have accrued had these entries been made to enable a confederate to take the money cannot be evaded by the bookkeeper's taking it himself. It is no defence that the false entries were made solely to enable him to escape detection. He used a means furnished by his agency to consummate successfully a fraud. The taking and the entries were one transaction, and it can hardly be contended that the ultimate loss of the bank was in no degree attributable to the false bookkeeping and the abuse of trust as bookkeeper. The falsification was parcel of the wrongful act, and this is deemed sufficient.

Indeed, it seems a reasonable general rule to assert, that, if the officer has, in any part of the transaction, acted otherwise than in perfect honesty and good faith, excuses cannot be heard to absolve the sureties. It is impossible to split up the transaction into parts, and to say this part was the only part which actually caused the injury, and this part was honest. Such a system of legal anatomy is simply absurd. Originally it was open to the courts to declare the undertaking absolute, and to

refuse to admit any explanatory matter by way of exculpation. If practical justice effected a relaxation of this possible stringency, yet it was only for the sake of protecting substantial *bona fide* innocence, not to aid in introducing a practice of the artful dissection of a complete whole into guilty and innocent components, and the referring the injury to the one or the other of these. If in any portion of the entire business there has been dishonesty, this must be regarded as tainting the whole.

Ratification

When we come to the subject of the powers and duties of cashiers, it will be seen that dealings may be had with these officers under such circumstances of time and place that the bank may not be bound by them. But the bank may at any time waive the irregularity, abandon its defence, and assume the liability which the party dealing with the cashier sought to impose upon it. It has an unquestionable right to do this, if it chooses. It depends upon the choice which the bank shall make between repudiation or ratification, whether or not it can have any remedy on the official bond. If it repudiates the transaction, it cannot sue upon the bond; for the reason that it has avoided all suffering. It would have no possible cause of action. But if it ratifies and adopts the transaction, the right of action for compensation for any injury consequent upon the irregularity accrues. Where a bank has to consider what line of action it shall take in such circumstances, it must be governed by its views of wise policy in the premises. If its reputation would suffer from a rigid adherence to its rights, and a more liberal conduct is deemed advantageous, it has the unquestionable right to act accordingly. It is under no obligation to the sureties in the bond to stand upon its extreme legal rights, and to narrow down their liability and watch over their interests to the sacrifice of its own. The possibility of such dilemmas occurring, and of the decision being in favor of corporate ratification, is an event which every bondsman must be assumed to contemplate as constituting an essential part of his risk. But it is evident that if, by the decision of the bank, the act does not bind it, then it can suffer no loss, however official the proceedings may have purported to be; and it is not the fact that the act purports to be official, and thereby accomplishes a fraud upon others, that gives the right of action to the bank; but it is the fact

that some substantial loss or measurable injury has been actually inflicted upon the bank itself, through the medium of the dishonesty or irregularity.[4]

§ 26. **Unusual Employment.** — The bond covers any duties belonging by custom to the office, and such as in the natural course of business [0] are assigned to the officer, as in the temporary absence of a fellow officer, or any similar emergency. But losses occurring by reason of extra duties not thus reasonably within the contemplation of the surety ground no suit against him unless the words of the bond cover the loss of the given kind unqualifiedly.[0a] See § 30.

Unqualified Insurance

A bond insured that the clerk should "well and faithfully serve", etc., and should not "cancel, obliterate, spoil, destroy, waste, embezzle, spend, or make away with" any of the books, cash, notes, etc., "of the bank or of any of the customers, which should be deposited in his hands, or intrusted to his custody or possession, or come to his care, custody, or possession." At request of a customer, the clerk was sent eleven miles to receive a sum to be deposited to the customer's credit in the bank. On

[4] Pendleton *v.* Bank of Kentucky, 1 T. B. Monr. (Ky.) 171.

[0] § 26. A bond for the faithful performance of the duties of the office of teller or cashier covers all defaults in the duties of such office annexed from time to time by those who are authorized to control the affairs of the bank; and the sureties enter into the contract in reference to the rights and authority of the president and directors, under the charter and by-laws. Minor *v.* Mechanics' Bank, 1 Pet. 46, 7 L. ed. 47; Planters' Bank *v.* Lamkin, R. M. Charlt. (Ga.) 29.

[0a] A bank was incorporated with power to appoint all necessary officers, to take bonds from them, and to make all necessary by-laws, rules, and regulations. By one of the by-laws it was provided that it should be the duty of every other officer of the bank to perform such services as might be required of them by the president and cashier. In an action against the principal and sureties of a bond given by a bookkeeper of a bank, conditioned for the faithful performance of the duties of his office, "and of all other duties required of him in said bank", the bond was adjudged to have been taken in conformity with the charter; and the bookkeeper having, whilst in discharge "of the other duties required of him", taken large sums of money, the sureties were rendered liable on his bond. Planters' Bank *v.* Lamkin, R. M. Charlt. (Ga.) 29. Where the bond of a receiving teller covered his duties as such, "or the duties to which, in the employer's service, he may be subsequently appointed or assigned by the employer", it was held that the bank might appoint him assistant cashier without notice to the surety. Fidelity Co. *v.* Gate City Bank, 97 Ga. 636, 25 S. E. 392 (1895).

his return he lost the sum. In suit by the bank the jury found that it was not the custom to send a clerk to receive deposits away from the bank. Nevertheless, somewhat strangely as it must seem, the court held that the loss was covered by the condition of the bond; remarking that the same would be the case where money should be received, or a check paid erroneously or wrongfully after banking hours, or if the clerk should be despatched to London on an emergency to procure funds.[1] In this case the bond seems to insure against loss of funds of the bank coming to the care of the officer, no matter how.

Temporary Absence

The receiving teller was assigned the duties of the general teller, in the temporary absence of the latter. The court said that a bank teller's official bond covers any duties to which, in the natural course of business, he may be assigned by the cashier or other superior officer in the temporary absence of the person whose duty it is to perform them.[2]

A bookkeeper's sureties are not released by the mere fact that he also assumed the duties of teller, unless the errors were connected with or induced by the employment as teller.[3]

§ 27. **Wrongful Act beyond the Period of the Bond.** — Unless otherwise expressed, the bond covers the legal term [1] of office of the person guaranteed (what constitutes the *legal term* being, however, a difficult question in some cases, see pp. 72–76); but whether, nothing being said in the bond on the subject, the surety is to be held to contemplate the possible extension of the officer's term under his election, in consequence of legislative action prolonging the corporate existence beyond the charter limit, *quære*.[2]

[1] Melville *v.* Doidge, 6 C. B. 450.

[2] Detroit Savings Bank *v.* Ziegler, 49 Mich. 157, 13 N. W. 496.

[3] Home Savings Bank *v.* Traube, 75 Mo. 199; Garnett *v.* Farmers' National Bank, 91 Ky. 618–620, 16 S. W. 709 (1891).

[1] § 27. See § 16.

A bond being executed for one year to indemnify a bank against the dishonesty of its cashier occurring during the term of the bond, or any renewal thereof, and discovered within six months of such term, or renewal, and there being a subsequent instrument to continue the former in force for another year according to its terms and conditions, the instrument will be construed as though the bond had been originally executed for two years. Rankin *v.* U. S. Fidelity etc. Co., 86 Ohio St. 267, 99 N. E. 314 (1912).

[2] The presumption that the official bond applies only to the existing term is very far from conclusive, and, if it is clear that the parties meant

A conflict has been supposed [3] to exist on this point between New Hampshire and Pennsylvania; but, keeping in mind the rule that the words of a judge are to be understood in reference to the facts of the case, the seeming disagreement disappears. In the New Hampshire case, the bank *did not cease to exist*, the legislative medicine being administered before death, and the court sustained this supplemental liability, such a continuance of the officer's term being within reasonable contemplation of the parties at the time of making the bond. In the Pennsylvania case, the bank *had ceased to exist* and was resuscitated, and the court denied that the bond once dead could be revived in this way.

So the cases do not, upon close inspection, seem to cross each other. When the charter limit is actually reached, or the bank in any way ceases to exist, if only for a moment, the officer is no longer an officer; he has come to the end of his term, and the bond is dead, and can only be revived by act of the parties to it, or by some event expressly provided for in the bond itself. But if a bond covers the term of a cashier's office, and by reason of legislative action the bank does not expire at the original charter limit, the cashier's term being thereby extended unbroken beyond said limit by a contingency easily within the contemplation of the parties at the time of executing the bond, it is at least clear that a case holding such a bond to cover such an extension is not substantially discordant with a case in which the bank's existence was absolutely determined, though the language of the judges may have been wider than their cases, their decisions broader than the foundation.

However, Ohio presents us with a case that is surely in conflict with New Hampshire; but, as will be seen by referring to the citations in the expansion of this section, the court, instead of setting out reasons for the faith that was in it, declare the references of the counsel conclusive. And yet, when these references are examined, there is only argument from analogy. In each case where the question of period arose, there was a definite limit inherent in the officer's term; in one case it was annual, in another he was elected for six months, and of course such limitations are very different from a contingency entirely external to the officer's

to create a continuing liability, the bond must be held to have done so. Fink *v.* Farmers' Bank, 178 Pa. St. 154, 169, 35 Atl. 636; Shackamaxon Bank *v.* Yard, 143 Pa. St. 129, 22 Atl. 208.

[3] See Parsons on Contracts.

term. Like that of the dissolution or continuance of the bank at the charter limit, there is nothing certain about that; but when a cashier's office is annual, that is a definite, certain limit, upon the very subject matter of the bond.

Therefore, on the whole, although it may be fairly urged that a surety should have the benefit of any doubt as to what may have been within his contemplation (though Mr. Burge thinks his words must be construed *contra proferentem*), yet upon the cases we must conclude that New Hampshire has the only well considered case upon the precise point.

Taking a new bond at a re-election determines the old, unless expressly reserved by a proviso in the new.

It is not necessary that all the acts in the chain of wrongful conduct causing the loss, and concealing it, should be done within the period; it is enough to charge the sureties, if any substantial part of such conduct occurs within the time covered by their bond. The remainder of this section is devoted to a fuller treatment of these points.

If the Officer is elected for an Expressly Limited Time, the Bond has Reference to that Period. Effect of Annual Re-election

The bond of an officer remains in force as a continuing obligation only during the period for which he legally holds office under his election. His re-election at the end of this period, and his entry upon a second term of office, though no actual gap intervenes, do not operate to revive or to keep alive his bond.[3a] If the office be annual, the bond should be annually renewed. Though if the office be annual with the proviso that the incumbent shall continue to hold until a successor is appointed and qualified, and the officer continues to hold over after the expiration of the year by virtue of this clause, his bond will likewise continue in force. It is

[3a] The condition in a bond is controlled and restricted by the recital, and when the recital refers to the term of appointment of a cashier "for one year" the sureties on his bond are not liable for defalcations commencing after the term of office to which the bond refers. Blades *v.* Dewey, 136 N. C. 176, 48 S. E. 627, 103 Am. St. Rep. 924, n. (1904).

By the terms of an appointment that "E. G. Hines be employed for the next year as cashier" he entered upon a new term, with a fixed limitation of time and beyond the limitation of which the original bond could be of no force and effect. Wapello State Sav. Bank *v.* Colton, 133 Iowa 147, 110 N. W. 450, 11 L. R. A. (N. S.) 493, n. (1907). See Rankin *v.* Tygard, 198 Fed. 795 (1912).

essential, however, that the office derive an annual character by force of some law, or legal resolution, or by-law, if the obligation of the bond is to be only of a year's duration.[3b] If the office is declared to be so by the charter, or in the organic law, or in the corporate by-laws, or perhaps even by a vote of the corporate government, it will be assumed that the sureties entered into their undertaking with a view to this established limitation upon its continuance.[4] But we have the authority of Amherst *v.* Root, cited below, for the doctrine that a mere habit or usage of the directors to re-elect every year does not impart the legal character of annual duration to the office. The sureties are not supposed to have regarded a custom which has in fact no particular necessity or object, and which may at any time be broken in upon or wholly abandoned without changing the legal position of affairs in any respect. The naked fact of annual re-election, therefore, is not sufficient to make the obligation of the bond only annual. This rule applies to all cases in which the bond names or refers to no specific limitation of the liability, and to all cases in which such general phrases are used as "during his continuance in office",

[3b] But see Blades *v.* Dewey, 136 N. C. 176, 48 S. E. 627, 103 Am. St. Rep. 924, n. (1904).

[4] Though the bond do not recite the term of the office or agency, if it be one of limited duration, by general statute, charter, by-law, or terms of appointment, the parties are still supposed to contract with a reference to the limited term, and the sureties will not be held answerable for the misconduct of the principal beyond that term, upon a new appointment, even though the words of the bond are that they shall be responsible for the principal, "at all times or any time hereafter." St. Saviour's Southwark *v.* Bostock, 2 (B. & P.) New R. 174; Hassell *v.* Long, 2 M. & S. (Eng.) 363; Peppin *v.* Cooper, 2 B. & Ald. 431; Parker *v.* Barker, 1 T. R. 295; Blades *v.* Dewey, 136 N. C. 176, 48 S. E. 627, 103 Am. St. Rep. 924, n. (1904); Ida County Sav. Bank *v.* Seidensticker, 128 Iowa 54, 102 N. W. 821, 111 Am. St. Rep. 189 (1905). Sureties on the bond of a cashier whose term of office is *annual* are not liable for defaults occurring after an election the next succeeding year, and the lapse of a sufficient time for him to qualify by giving a new bond. Harris *v.* Babbitt, 4 Dillon 185. See Rankin *v.* Tygard, 198 Fed. 795 (1912).

In Ulster County Savings Institution *v.* Ostrander, 15 N. Y. App. Div. 173, it was held that where a treasurer who is elected for one year gives a bond to pay over . . . to his successor "at the expiration" of his office and to faithfully serve . . . "during his continuance in office", the surety is only liable during the first year.

But the same court later held that a bond for faithful service "during his continuance in office, even though he hold under successive appointments", binds the surety although the officer held over without a reappointment. Ulster County Savings Institution *v.* Young, 15 N. Y. App. Div. 181.

or "so long as he shall be" cashier, teller, etc. Of course, if the bond distinctly declares its own duration, this is conclusive upon the question.[5] Where the charter prescribes an annual election of directors, and that the "directors for the time being shall have power to appoint a cashier", the tenure of office of the cashier is not thereby rendered annual. But having been once duly appointed, by a vote containing no express limitation, he will continue to hold office by virtue of this original appointment, either until the expiration of the charter or until his removal before that time by the directors.[6] And where the bond of a cashier is without any limitation as to time, the liability of the surety does not end at the expiration of the term of office of the board of directors that appointed him.[7]

In a Delaware[8] case, the charter gave directors power to appoint cashier, annexed no term to the office, but required him to be qualified by taking oath and giving bond. In 1862 and 1865 he gave bond; in 1863 and 1864 he did not, though annually re-elected. The bond was conditioned for a faithful discharge of his duties as cashier, no time being named. The question was whether the cashier's term of office expired at the new election, or continued till the cashier was qualified by a new bond. The court took the latter view, for otherwise there would not be a succession of cashiers qualified as required by the charter, and *in the absence of any express rule that the office shall expire ipso facto on a new election, it is a reasonable construction that the old term shall continue till the new is duly and properly entered on.*

[5] Welch *v.* Seymour, 28 Conn. 387; State Treasurer *v.* Mann, 34 Vt. 371; Dedham Bank *v.* Chickering, 3 Pick. (Mass.) 335. See also Boston Hat Manufactory *v.* Messinger, 2 *id.*, 223, and the authorities therein cited and discussed. But it should be remarked that Dedham Bank *v.* Chickering, though not overruled, was yet declared to be of questionable soundness, in Johnson *v.* Frankfort Bank, 23 Me. 322. "During the time of his employment by the bank" was held to bind the surety where the cashier continued in office several years without re-election; although the State law required annual election of such officers. Shackamaxon Bank *v.* Yard, 143 Pa. St. 129, 22 Atl. 908. "For and during all the time he shall hold said office" continues over all appointments. Westervelt *v.* Mohrenstecher, 76 Fed. 118.

[6] Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 413.

[7] Merchants' Bank of Ellis *v.* Honey, 58 Kan. 603, 50 Pac. 871 (1897).

[8] Sparks *v.* Farmers' Bank of Delaware, 3 Del. Ch. 274, 294.

Statutory Provisions

A similar rule was laid down in the case of Amherst Bank *v.* Root,[9] in a very clear and satisfactory opinion, delivered by Chief Justice Shaw. The *statute provided* that the *cashier should retain his place until removed therefrom, or until another should be appointed in his stead.* In 1831, a cashier was appointed and gave bond; in 1832, he was reappointed, and gave no new bond. He continued in office several consecutive years, and in 1836–37 was guilty of defaults. His two appointments were each expressed, on the records, to be "for the year ensuing." The portion of the opinion which we have occasion to rely upon at present is substantially as follows: *This statutory provision governs the tenure by which the cashier holds office, which is "until another is appointed."* If he is to hold the office, he is also to perform the official duties, and a bond that he shall faithfully perform the duties will "include duties performed after the limited time for which he is chosen, and during the time that the office is continued by force and operation of law." Though the election was expressed to be for the year next ensuing, yet, the office not being by law annual, he held it by force of the general law until another should be appointed in his stead. That the directors hold by virtue of an annual election has no effect in controlling the positive provision of the law concerning the cashier's tenure of office. A plausible argument is, that the fact of an annual election is evidence of a by-law or usage making the office annual. But the directors are supposed to know the general law, which declares that the cashier shall continue in office till they remove him. Their re-election, therefore, amounts only to the fact that they wish to give expression to their

[9] Amherst Bank *v.* Root, 2 Met. (Mass.) 522. Judge Dewey's dissenting opinion appears wholly unconvincing when compared with that of the Chief Justice.

The case of Amherst Bank *v.* Root is discussed in Ida County Sav. Bank *v.* Seidensticker, 128 Iowa 54, 102 N. W. 821, 111 Am. St. Rep. 189 (1905), which holds that a statute providing that a cashier should hold his office "at the pleasure of the board" is not the equivalent of the Massachusetts Act, and that a cashier's bond which does not expressly limit the period of its operation must be read in connection with the terms of the appointment under which a cashier holds his office, and if such appointment be for a definite period the bond ceases to be effective upon the expiration of the term so designated, and that the surety is not bound for defalcations occurring after four successive annual re-elections. See, also, Blades *v.* Dewey, 136 N. C. 176, 48 S. E. 627, 103 Am. St. Rep. 924, n. (1904).

will that he should remain. *His election to an office which he already holds, and would continue to hold without an election, is only a manifestation of their intent that he should continue to hold.* That they themselves regard it thus, as a continuance of an existing office, not the commencement of a new one, is obvious from their requiring no new bonds. "The cases where it has been held that the generality of the words of an obligation may be restrained and modified are of two classes: *first*, where there is a preamble or recital, stating directly or by implication the intent and purpose of the parties to the bond; or, *secondly*, where it is a stipulation for fidelity in office, and it appears by the nature of the constitution of the office that it was limited to a particular time." In the present case the words are general; there is no recital; the office itself is not annual. That the election was "for the year ensuing" is answered by the fact that the law made the office a continuing one until the incumbent was removed, and another chosen in his place; which did not happen till after the occurrence of the breaches assigned. Dewey, J., dissented, on the ground that it was competent for the directors to make the office annual, and they had done so by their votes.

Expiration of Charter. Supplemental Liability

If no other legal limitation can be annexed to the term of office, it might seem that at least the duration of the charter, or the period for which the corporation may exist under the law of its organization, must be the utmost time over which the bondsmen's liability could be extended. It is clear that a renewal of the charter or extension of the period of existence cannot operate to carry the obligation over into the second lease of corporate life, if the charter limit is reached before the renewal. But if the bank does not cease to exist, its existence being prolonged by an act before the limit of its former term is reached, it has been held [10] in New Hampshire that the bond continues. The possibility of such a prolonging of the cashier's term was within reasonable contemplation at the time the bond was made. O. might be cashier for a week or for life, according to circumstances, one of which is such legislative action as the present, and the bond was given *for all the time he should be cashier.*

The court said: "The true rules of law to be deduced from all

[10] Exeter Bank *v.* Rogers, 7 N. H. 21.

the cases on this subject are these. When the term of office is limited to a particular period, as a year or five years, and the person appointed cannot continue in office for a longer period without a new appointment, then the official bond, if nothing appear to the contrary, is presumed to be intended to be confined to the particular term; and if the officer be reappointed there must be a new bond. But when an office is held at the will of those who make the appointment, and is not limited to any certain term, then the bond is presumed to be intended, if nothing appear to the contrary, to cover all the time the person appointed shall continue in office under the appointment.[10a] Thus a sheriff is appointed in this State to hold his office during the term of five years, and cannot hold it beyond that term without a new appointment. The bond he gives does not therefore extend beyond the term for which he is appointed. But the deputies of the sheriff hold their offices at the will of the sheriff, and their bonds may extend to any period during which they are continued in office, notwithstanding the sheriff may in the meantime be reappointed, and be compelled to give new bonds himself. These rules are founded in sound reason and good sense. The presumption which the law makes as to the intention of the parties to the bond is the natural presumption in both cases. Now we are of the opinion that the terms of the condition in this case are broad enough to embrace the whole term during which Rogers was cashier, and that there is nothing in the form of the appointment, the nature of the office, the words of the condition, or the conduct of the parties, that gives the slightest indication of any intention in any party that the bond should be limited to the period mentioned in the original charter as the termination of the corporation."

In Thompson *v.* Young,[11] the facts were these: —

In the year 1811, the Bank of Muskingum was incorporated, the charter to continue until the 1st of January, 1818. Marple was appointed cashier. Vanhorn, Price, Thompson, and McIntire executed with Marple, as securities, a bond in the penalty of $20,000. Marple proceeded to discharge the duties of cashier.

Before the 1st of January, 1818, the legislature extended the

[10a] This holds true in regard to a surety on a bond given by a bank designated as a depositary by a city. Snattinger *v.* Topeka, 80 Kan. 341, 102 Pac. 508 (1909).

[11] Thompson *v.* Young, 2 Ohio 334.

charter until the 1st of January, 1843. Marple was continued cashier, without either a new appointment or a new bond.

In 1815, McIntire, one of the securities, died. In 1819, Marple became a defaulter to a large amount; and suit was commenced against Marple, Vanhorn, Price, and Thompson, the surviving obligors, and judgment obtained against them for the amount of the defalcation. At the trial, no evidence was given of any default before the 1st of January, 1818. The court said: "The authorities adduced by the defendants are conclusive that the securities were not bound for any defalcation that took place after the expiration of the first charter. And we hold them to be in accordance with the soundest principles of justice."

The chief authorities to which reference was made were to the following effect: —

In Arlington *v.* Merricke,[12] the defendant entered bonds as security for Jenkins, appointed deputy-postmaster for six months. In an action to recover on account of Jenkins's failure in some way, his counsel, Saunders, said: "The defendant, by the intention of the condition, was not to be responsible for Jenkins for any longer time than for the said six months, although the words are that Jenkins, during all the time that he shall continue deputy-postmaster, etc., indefinitely, shall observe and perform, etc.; yet this time, which is indefinite in itself, ought to be construed only for the said six months, for which the condition recites that Jenkins was appointed to be deputy-postmaster, and to which the condition relates. And that rather because Jenkins cannot continue deputy-postmaster for any longer time than for the said six months, unless he be appointed anew, and have a new deputation for a longer time. As he said that, by the construction which the plaintiff's counsel would put upon it, the defendant would be tricked; for it appears that the defendant intended to be bound for Jenkins for the due execution of the said office only for six months; but the plaintiff would have the defendant bound during the whole life of Jenkins, which is unreasonable to suppose." Hale, Chief Justice, said: "The condition shall refer to the recital by which the defendant was bound only for six months, and not longer, and that for the reason above alleged by Saunders."

A foot-note says, "This has been considered a leading case upon this subject ever since."

[12] Arlington *v.* Merricke, 2 Saunders 414.

In Wright *v.* Russell,[13] De Grey, C. J., said: "The law is, that the surety shall not be bound beyond the scope of his engagement, as understood at the time he entered into it. *Where there is the least difference between the condition and the breach assigned, the surety will not be bound.* Here Wright takes a clerk when sole, with security for his good behavior in his service. He then, by his own act, takes in a partner. From that moment the suretyship is at an end. If there is one, there may be twenty partners taken in. Is the surety liable if Baird disobeys the orders of any one of these partners? Or can the surety be called upon to insure the money of all the partners? Certainly not."

Bigelow, Clerk, etc. *v.* Bridge.[14] "*By the Court.* The bond in this case appears to have been given to the plaintiff, as clerk of the peace for the county, pursuant to the provisions of the statute of 1785, c. 76, § 1. But the choice of county treasurer being by that statute annual, it is apparent that the bond required by it was intended for the protection of the public, so long only as the person chosen should continue in office in virtue of such election. A new bond should regularly have been taken for each several year for which the defendant was elected. If this bond were valid against the defendant, it would be equally valid against his sureties; but they could never contemplate their contract as binding them thus indefinitely. And indeed it is to be presumed that the plaintiff did not consider them as held to answer the present demand, as he has not joined them with their principal in this action. But the principal in a bond is no further bound than his sureties."

It will be observed that the authorities are not precisely to the point, since, so far as they directly refer to the limitation of the surety's obligation by the term of the principal's office, the limitation was one inherent in the office itself. In one case the office was annual, in the other for the definite term of six months, which is not exactly similar to the case in which they were cited, the limitation there being not inherent in the office, but aside from it, — a contingency which might or might not affect the term of the principal's office.

Authority is clear that legislative reaction of a deceased bank does not infuse new life into the bond.[15] In Pennsylvania the

[13] Wright *v.* Russell, 2 W. Bl. 934.

[14] 8 Mass. 275.

[15] Bank of Washington *v.* Barrington, 2 P. & W. (Pa.) 27; Thompson *v.* Young, 2 Ohio 334; Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 413.

court declared that the revival of the charter after a forfeiture had been legally consummated by default of the cashier will not operate to revive the obligation of the sureties on this bond.

"By the constitution of this corporation, its existence was subject to be terminated alike by forfeiture of its charter and efflux of time; and for the benefit of each of these as limitations of the term of their liability, the sureties had stipulated, not indeed in terms, but tacitly, and by irresistible implication from the nature of the contract. They had treated on the basis of corporate existence as it then stood, and in reference to all its incidents. They might have seen, and they are therefore to be considered as having known, that the bank was subject to cease by the happening of a contingency, and that with it would cease their liability. Who can say this did not enter into their estimate of the risk which they consented to take on themselves? They were, in effect, insurers, but without a premium, of the cashier's fidelity; and they were entitled to the benefit of any termination of the risk which may be brought within the letter or the spirit of their contract. Their engagement was without a consideration beneficial to themselves, and it is therefore not to be extended beyond its strict technical import."

In this case the forfeiture was absolute and complete, when the legislature came to the rescue, and declared the bank should come again into existence, ratifying the acts done in the interval; and the court are careful to state that they have not to pass on a case where the legislature had only intervened to prevent the consummation of an inchoate forfeiture.

That both the officer and the corporate government have, in fact, supposed, or have conducted themselves so that it must be assumed that they supposed, that the bond was still continuing in force after it had in fact been terminated in any of the ways above described, does not affect its validity, or operate as a waiver of its determination. The misapprehension, being common to both parties, does not prevent either from standing upon his original rights.

Taking a New Bond

a. When an officer has given a bond in which no express limitation of time is set to the duration of the obligation, if afterwards,

at the close of a year or other term of his incumbency, he is again appointed, again qualifies, and gives a new bond, — the old appointment is thereby terminated, the obligation of the old bond ceases, and no recovery can be had against its obligors by reason of his subsequent default.[16] But if there is a special proviso in the second bond that it shall not impair the obligation of any previous bond until the same shall have been given up and cancelled, all the bonds will still be legally valid, and will be equally available as security against breaches until such cancellation of the earlier ones actually takes place.[17]

Part of the Wrong beyond the Bond Period

b. It has sometimes happened that an officer, being reappointed for a second term of office, and giving a new bond for the new term, is at the very time of his appointment a defaulter, though the fact is unknown to all the parties save himself. If, then, after the reappointment, he does any further wrongful official act in reference to the existing defalcation, though only for the purpose of concealing it, and even though he may not in any manner increase its amount or alter its nature, the sureties upon the second bond will be liable.[18] Whether or not the sureties on the first bond could also be held, either altogether instead of the sureties on the second bond, or for the purpose of making up the full amount of the loss if this could not be obtained from the sureties on the second bond, is a question upon which the only two authorities which we have are somewhat at variance. In the Indiana case, the officer misappropriated moneys received by him in his second term to make good his defalcation in the previous term, and the court held positively that *only* the sureties for the second term could be held. In the Massachusetts case, the cashier had embezzled in the first term; after his reappointment, he borrowed money, as cashier, and placed it in the bank to meet an examination, after which he withdrew the amount from the bank and returned it to the lenders. The court said, although a deficit existed prior to the execution of the second bond, "and which may have been covered by an antecedent

[16] Johnson *v.* Frankfort Bank, 23 Me. 322. See Wapello State Sav. Bank *v.* Colton, 133 Iowa 147, 110 N. W. 450, 11 L. R. A. (N. S.) 493, n. (1907).

[17] Pendleton *v.* Bank of Kentucky, 1 T. B. Monr. (Ky.) 171.

[18] Ingraham *v.* Maine Bank, 13 Mass. 208; Cook *v.* State, 13 Ind. 154.

bond ", yet the transaction in the second term was not distinguishable from an actual payment from his own funds to make good the deficiency, and a removal afterwards of corporate funds without the assent of the government. It follows from these cases, that it is not necessary that the entire transaction creating the liability should take place within the period covered by the bond. The occurrence of any substantial part within that period is enough to make the liability attach. *A fortiori*, therefore, if the whole of the fraudulent part falls within the term of the obligation, the obligors will be bound.[19]

§ 28. **The Surety is discharged by a Material Change** in the relations between the officer and the bank, so as to increase the risk in an important degree, or in the identity of the obligee, unless the change is provided for in the bond.

For the surety has a right to judge for himself of the circumstances under which he is willing to be liable, and they cannot be *materially*, *i.e.* substantially, changed without his consent, unless the change is manifestly for his benefit.

§ 29. **Identity of Banking Firm.** — Where there is a change in the banking firm to which the obligation of the bond runs, it will depend upon the language of the bond whether it will enure to the benefit of the new firm. It may be so written that the obligation is to the original firm and to its successors through any number of subsequent changes; or it may be so written that the obligation is only to the individuals who at the date of the bond composed the firm. An early case touching upon this question was that of Wright *v.* Russell.[1] The guarantor in the bond undertook with A. for the fidelity of a clerk in A.'s employ, so long as he should continue in A.'s service as clerk. Afterward A. took a partner, and, the clerk being in default, suit was brought by A. upon the bond, alleging that the clerk had received money on account of the partnership, and had not paid it over. But the court held that A. could not recover; that the taking of a partner by A. put an end to the obligation. The condition of the obligation ran to A. alone, and the breach was not strictly within the condition; nor was there anything to show that the surety intended to guarantee the clerk's fidelity to any other person than A. This case has been subjected to much criticism; but

[19] State *v.* Van Pelt, 1 Cart. (Ind.) 304.

[1] § 29. 3 Wils. 530, 2. W. Bl. 934. Also to the same effect is Dry *v.* Davy, 10 Ad. & El. 30.

appears never yet to have been directly overruled upon any substantially identical condition of facts.[2]

The directors of an unincorporated banking company merged the association into an existing corporation chartered as an insurance and trust company, and continued to do banking contrary to charter. The cashier's bond was held inoperative by the change.[3]

Yet in sundry cases the obligation has been held to be continuing where the court felt able to hold upon the facts that the bankers were really the same copartnership throughout the several changes.[4] Where the obligee, being a joint-stock banking company, received, after execution of the bond, a considerable accession of proprietors and capital, and thereupon increased the number of directors and changed its name, it was nevertheless held that the bond continued a live security, surviving these changes, on the ground that the bank, not having changed its constitution in any respect, had preserved its identity.[5] This seems to be the true test, in theory, whether the obligee has lost or continued his or its identity. But, as usual, the difficulty lies in applying the theory to the facts, and determining the question of continued identity. Some of the cases seem to make a break very much easier of accomplishment than others.

Where a state bank is converted into a national bank with a change of name, under the National Banking Act, neither its identity, nor its right to sue upon liabilities formerly incurred is affected.[5a]

But a bond requiring the clerk to account to the banker and his executors, administrators, and assigns, does not cover defaults committed subsequently to the obligee's death when the clerk is in the employ of the executors.[6]

§ 30. **Change in the Duties of the Officer.**—If the new duties are of a lower grade, and less risk than the functions of the office guaranteed, the surety is not discharged wholly, though he may not be liable for a loss arising from such employment. See § 26.

[2] Barclay *v.* Lucas, 3 Dougl. 321, 1 Term 291, n. Though, as would appear by the note at the end of the report of the case in Douglas, it also has not escaped question.

[3] Bensinger *v.* Wren, 100 Pa. St. 500 (1882).

[4] Chapman *v.* Beckinton, 3 Q. B. 722; Metcalfe *v.* Bruin, 12 East 400; Wilson *v.* Craven, 8 M. & W. 584.

[5] Metcalfe *v.* Bruin, 12 East 400.

[5a] Michigan Insurance Bank *v.* Eldred, 143 U. S. 293, 36 L. ed. 162, 12 Sup. Ct. 450 (1892).

[6] Barker *v.* Parker, 1 Term 287; but see Strange *v.* Lee, 3 East 490.

Presumed Assent of Surety

Or if the change, though increasing the risk, does so in a slight and unimportant manner, and is such a variation as is likely to occur in the course of business, it does not avoid the bond, for the surety is presumed to know that the directors have power to make such regulations and changes as they see fit, and the surety is presumed to contemplate such action, and assent in advance to reasonable and moderate alterations in official duties; otherwise the security would be truly a bond and fetter on the business of the bank, rather than an obligation upon the surety. But if *duties of a higher grade*, requiring more skill, or subjecting the officer to greater temptations, are added, the surety is discharged, though it may be doubted if the rule is not more sweeping than justice requires. See § 17.

Express Assent

The language of the bond may expressly refer to such matters, or be so broad and absolute as to cover them. See § 26. We will now consider the cases that illustrate these rules.

Lower and Higher Grade Duties

a. Assent to any considerable increase of risk can never be implied. The *character* of the risk can never be materially altered. A bookkeeper may have many more books given him to keep than he had at the time of the execution of the bond; a cashier may be deputed to act as teller; "for the office of teller is not higher than that of cashier." Such changes do not work substantial increase in the bondsmen's risk, or an increase which it can be supposed that they would have repudiated, or would have considered unlikely to occur, when they entered into the contract of insurance. The bookkeeper is a bookkeeper still; though he has more labor, it is of the same nature; the cashier only fulfils in person the functions of a subordinate, which are strictly consistent with his own office. But to raise an assistant bookkeeper to the office of teller, or to the still higher office of cashier, would assuredly be to vitiate his bond as a security for his good conduct and sufficient skill in his new position.[1] It would be absurd to

[1] § 30. Anderson *v.* Thornton, 3 Q. B. 271. See also Grant on Bankers and Banking. He there lays down the principle, very soundly, that a

take for granted that persons willing to guarantee that a man has skill and ability enough to assist in keeping books, are therefore willing to guarantee that he has skill and ability enough to be the teller or cashier of a banking corporation; equally absurd to declare it to be an implication of law that, because the same persons will guarantee his honesty in the circumstances of such moderate opportunity and temptation to fraud as he must encounter in the bookkeeping, therefore they will, and in fact do, guarantee the same honesty in the face of the vastly increased opportunity and temptation held out by the duties of teller or cashier.[2]

A bank bookkeeper who, in 1863, had given bond for faithful discharge of his duties as bookkeeper, was, in 1870, appointed teller with an increased salary, and in 1879 was a defaulter. Held, that the bond did not cover the defalcation.[3]

Words are sometimes added to the effect that the officer shall perform all the "duties of the said office which may be prescribed by the directors." These words clearly enlarge, rather than restrict, the responsibility of the sureties, and distinctly anticipate that additional duties may be imposed during the term of the suretyship, and will be included within its protection. But evidently these additional duties must be consistent with the functions of the office named; or, if not consistent, they must at least be of a lower grade and a less risk. A teller could not be made a director, nor could a bookkeeper be made a president, and still remain guaranteed by this bond, by virtue of the enlarging power of this phrase.[4]

A cashier's bond was conditioned to secure the faithful dis-

variation, without assent of surety, which may amount to substituting a new for the old agreement, is an absolute discharge of the surety. This is sound, and accords with the text, though Grant's further designation of any variation "which may prejudice" the surety ought in our view to have been rather more narrowly restricted, as by limiting it to cases of *substantial* prejudice, or the prejudice of that kind or degree which the surety could not have been reasonably expected to contemplate as a possibility when he entered into the undertaking.

[2] Minor *v.* Mechanics' Bank, 1 Pet. 46, 7 L. ed. 47; Rochester Bank *v.* Elwood, 21 N. Y. 88.

[3] National Mechanics' Banking Association *v.* Conklin, 24 Hun (N. Y.) 496 (1881).

The change from assistant cashier to cashier without increased responsibility will not forfeit an indemnity bond. First National Bank *v.* United States Fidelity etc. Co., 150 Wis. 601, 134 N. W. 742 (1912).

[4] Durkin *v.* Exchange Bank, 2 Patt. & H. (Va.) 277.

charge of "all his duties as clerk of said bank", also for protection against his misappropriation of any funds of the bank which might "come under the care or control of said cashier as clerk." It was in evidence that the cashier performed to some extent the duties of teller; also that this was contemplated to be included in the phrase "duties as clerk." It was held that the sureties on the bond were not entitled to a ruling, as a matter of law, that there had been such a change in the duties of the clerk as would discharge them from liability for his wrongful appropriation of funds.[5]

Where a cashier was employed by the bank in transacting what was not properly banking business, in the course of which he appropriated the bank funds to his own use, the sureties on the bond were liable for moneys so appropriated.[6]

§ 31. **Increase or Reduction of Salary.** (See § 17.) — A clerk was paid by salary at the time of the giving of the bond, and afterward it was arranged that he should be paid by commissions, which gave him a larger return than his salary, and it was held that the surety was thereby discharged from further liability.[1] And, so again, where a clerk, in consideration of having his salary raised, agreed to become liable to bear one-fourth part of all losses on the discounts made by the bank, it was held that, from the date of this new arrangement, the surety was discharged.[2]

There does not seem to be much reason in the former of these decisions, nor is our respect for it increased when we find a reduction of salary held not to discharge the surety's obligation.[3] Surely one would think a reduction of salary more likely to lead to negligence in labor, or to dishonesty, than an increase of salary, though the court, in the first case cited, thought otherwise.

In the second case the liability assumed by the clerk is a much more substantial ground for discharge than the increase of salary, for a new liability might give occasion for stronger temptation to cover it. So common and unsubstantial a change as to its effect on the risk seems a very unsatisfactory ground of avoiding the bond.[4]

[5] Rollstone National Bank *v.* Carleton, 136 Mass. 226.

[6] Springer *v.* Exchange Bank, 14 Can. S. C. Rep. 716.

[1] § 31. North Western Railway Company *v.* Whinray, 10 Exch. 77.

[2] Bonar *v.* Macdonald, 3 H. L. Cas. 226.

[3] Frank *v.* Edwards, 10 Exch. 81.

[4] Increase of commissions of agent held not to invalidate bond. Smith *v.* Addison, 5 Cranch (C. C.) 623; People *v.* Vilas, 36 N. Y. 459; Amicable Ins. Co. *v.* Sedgwick, 110 Mass. 163.

Increasing a cashier's salary and enlarging his duties, but changing neither the character of the duties nor his relation to the bank as cashier, is no defense to an action against the sureties for the cashier's violation of duty.[5]

§ 32. **An Increase of Capital Stock** may be considered a fact within the contemplation of the surety, and though a change of risk, it is a change of such nature as may happen at any time in the course of business by the accumulation of deposits. This is the opinion of Delaware.[1] The court rest their decision on the simple statement that there had been no enlargement of the cashier's duties; that "the sphere of his duties was the same, although the subject matter of his charge might be increased, which is no more than what happens from day to day from fluctuations in the amount of deposits."

In Massachusetts, the court consider that to hold the sureties after the increase would be to extend and enlarge their liability.[2] In the Delaware case the cashier's bond did not cover loss by his mistake; in the Massachusetts case it did; and it was considered obvious that the chance of mistake was increased by enlargement of the capital. If the chance of loss by mistakes of greater number or magnitude released the surety in Massachusetts, it may be difficult to imagine why the increased temptations of larger business should not have had the same effect in Delaware; in other words, the difference of facts in the cases seems insufficient to explain the contrariety of the decisions.

It may well be argued, that a surety might be willing to guarantee O., in a bank with a small capital, and the fluctuations of deposits likely in such a bank, and yet be unwilling to guarantee him in a bank with a larger business; for although he in any case contemplates fluctuations, the argument of Delaware is not entirely satisfactory, for contracting in reference to fluctuations in the business of a bank with a small capital does not cover a change of the line round which the variations are grouped, — an elevation of

[5] Wallace *v.* Exchange Bank, 126 Ind. 265, 26 N. E. 175.

[1] § 32. Bank of Wilmington & Brandywine *v.* Wollaston, 3 Harr. (Del.) 90.

[2] Grocers' Bank *v.* Kingman, 16 Gray (Mass.) 473. It seems just that the bondholders should not be held in any case not clearly within their contract, but Mr. Burge, in his work on Suretyship (p. 646), says the words of the bond are to be construed strictly against the surety, for they are his words. This rule is, however, a mere lifeless formula, that is only used by the courts when they can see no other way to sustain the interpretation they think just, or when no other reason applied.

their centre of gravity. A man may stand in the waves at low water, who would be overwhelmed by the billows of the higher tides.

On the other hand, it is not every increase of liability that can avoid a bond; else each new deposit, or temporary absence of a superior officer, would have that result. The true question seems to be, Is the enlargement such as was within the reasonable contemplation of the parties at the time of making the bond?

And as the increase of capital is one of the bank's well-known powers, set down in its organic law, and quite frequently exercised, it would be hard to imagine on what ground it could be said not to be contemplated.

Still, the just principle, that in case of doubt the surety should be favored, not the bank, urges decision in the opposite direction, and perhaps the best rule on reason and authority is, that any *substantial* increase of risk, *not expressly provided for*, or *necessarily incident to*, the bank's business as ordinarily carried on, will discharge the surety. See § 17.

§ 33. **Unreasonable Retention of the Officer** after discovery of his defalcation will (perhaps)[0] discharge the sureties as to any *subsequent* breach of the bond.

[0] § 33. A comparison of this section with § 37 will disclose the fact, that while the surety is not discharged by direct command of the directors to do an unlawful act, yet he is supposed to be released by neglect of the directors to discharge or suspend the officer with reasonable despatch. The question in both is substantially this: Is the bank to lose its remedy against the cashier's bondsmen for any breach of the condition of the bond, because some other officer of the bank is also in fault? (See the Mass. case cited § 38, and Minor *v.* Mechanics' Bank at the end of § 37, and § 17 *a*.) The surety does not agree to indemnify provided the other officers conduct themselves properly, but if O. conducts *himself* improperly. If the stockholders become aware of O.'s defalcation, and do not act in the premises, that might relieve the surety from future liability; but the directors are not the bank, and if their wrongful conduct in commanding or connivance with a dishonest act of the cashier does not deprive the bank of its remedy against the surety, on what ground would their connivance with a second wrong, knowing of a prior offence, or the less fault of neglecting to discharge O., operate to release the surety? True, it may be argued that the bank intrusts the superintendence of the cashier and subordinates to the directors, and must be bound by their conduct in the matters given into their charge; but such an argument applies to *all* the cases of § 37, as well as to those of § 33. It has been declared that mere negligence in examining the accounts of a cashier is no release of his sureties. Black *v.* Ottoman Bank, 10 W. R. 871; Atlas Bank *v.* Brownell, 9 R. I. 168. In Amherst Bank *v.* Root, 2 Met. (Mass.) 522, C. J. Shaw says, "The idea that the cashier is excused by the act or negligence of the directors arises from considering the board of directors as the corporation, and then apply-

A reasonable time is allowed for the directors to assemble and act in the premises. But if misconduct is suspected, or even actually discovered, and the directors are satisfied at first only to suspend the wrong-doer temporarily from the exercise of his functions, and pass a vote to that effect, the liability of the bondsmen still continues until the suspension is actually effected. At least this is the case if there is no unnecessary or unreasonable delay in carrying the suspension into effect.[1] For though the continuance in office by the directors of an official, whom they know to be dishonest and unfit for his post, may have the effect of vitiating the obligation of his bond as a security for his defaults occurring *after* the knowledge and continuance in office,[2] yet a suspension is not, in fact, a continuance in office. The directors have a right to take this step first, for the purpose of gaining time for more elaborate investigation and deliberation. If they take it with due promptitude, it is enough. For the guilty party is as incompetent to do acts which will place his bondsmen under any further liability when he is suspended, as when he is absolutely

ing the very equitable principle, that one ought not to recover of a surety damages caused by himself. We think the principle does not apply." The board is not the corporation in such matters. To hold it so would defeat the very object of the bond. See United States *v.* Kirkpatrick, 9 Wheat. 720, 6 L. ed. 199; Minor *v.* Mechanics' Bank, 1 Pet. 46, 7 L. ed. 47; Farmington *v.* Stanley, 60 Me. 472; Tapley *v.* Martin, 116 Mass. 275. No negligence of those with whom rests the duty of supervision, short of a virtual connivance at the official delinquency, or a wilful shutting of the eyes to the fraud about to be committed, can release a surety. Dawson *v.* Lawes, Kay 280. See Story's Eq. Jur. § 325. It is to be noted that these decisions are negative; do not say even that fraud would discharge the surety, but that nothing less can, and especially that the fraud of which they speak as possibly able to release is the fraud of the person interested, not of his agents. See on this subject Tapley *v.* Martin, 116 Mass. 276; Graves *v.* Lebanon Bank, 10 Bush (Ky.) 23.

The weight of authority and reason seems heavily against releasing the surety because of the directors' fault, unless it is so expressed in the bond, or the organic law contains some provisions touching such matters, which may therefore be considered as contemplated in the contract of suretyship. Section 33 has no decision to rest upon that goes to the point, but the law was stated as in § 33, without the "perhaps," by Mr. Morse, and is retained by the editor in respect to his opinion.

[1] M'Gill *v.* Bank of the United States, 12 Wheat. 511, 6 L. ed. 711.

[2] This doctrine is, perhaps, to be fairly implied from the language of the court in Taylor *v.* Bank of Kentucky, 2 J. J. Marsh. (Ky.) 568; which, however, only holds directly that the retaining an officer in office after knowledge of his default does *not* exempt the surety from liability for all faults *prior* to the knowledge and retention. Also *arguendo* in Franklin Bank *v.* Cooper, 36 Me. 179. See note 0, above.

dismissed. But the neglect of the directors either to suspend or to remove the officer, after they have become aware of his dishonesty or incompetence, will not relieve the sureties from the liability which had already accrued for breaches which had been consummated prior to the time when the directors acquired such knowledge.[3] It only annuls the bond for the future.

§ 34. **Satisfaction** received by the bank is a good defence. But a payment will be applied to known defalcations in preference to those unknown, though prior.

The cashier, who had given a bond with sureties, embezzled money to the amount of $4,000. The capital stock of the bank was afterward increased, the embezzlement remaining undiscovered. The cashier continued in office, and no new bond was required. He continued his embezzlements upon a much more extensive scale after the increase of the corporate capital. At last, being detected, he turned over to the bank assets to the value of $20,000. The bank sued the sureties to recover the deficit which still existed. The court ruled that the increase of capital put an end to the liability of the sureties from that time forth. The sureties then claimed that the payment made by the cashier should be appropriated first to the discharge of his earliest embezzlements, by which means the sum of $4,000 embezzled by him prior to the increase of capital would be restored, and the sureties would practically escape without loss. But the court said, that "inasmuch as that embezzlement (of the $4,000) was not known to the bank when the conveyance was made (by the cashier), and the purpose of the conveyance was to cover, as far as it would, the known defalcations of the cashier, . . . the sureties are not entitled to have that property applied in discharge of their liability. The property was neither conveyed nor received for that purpose." [1]

§ 35. **The Statute of Limitations** usually requires suits on cashier's bonds to be brought within two years after the cause of action arose. In suit upon a bond, whereby the cashier was obliged to make and give full satisfaction and recompense to the bank for all moneys, bills, notes, and effects which should come to his hands, it was held that the cause of action did not accrue at the date of any defalcation or embezzlement, or other act protected against,

[3] State Bank *v.* Chetwood, 3 Halst. (N. J.) 1.

[1] § 34. Grocers' Bank *v.* Kingman, 16 Gray (Mass.), 473.

but that it be accrued when the cashier, upon quitting his office, failed to make a full delivery of the funds received by him; and from this latter date the statute began to run.[1] If the bank had previously become aware of the defalcation no doubt the statute would have begun to run from the time of knowledge of the cause of action.

§ 36. **Revocation.** — A surety may at pleasure revoke his guaranty upon reasonable and proper notice, the circumstances being such that the bank can dismiss the officer without injury to itself if he should fail to provide new sureties, unless the bond is on a continuing consideration the benefit of which the surety cannot or does not renounce, or it was made to cover a transaction not yet completed.[1]

In England, however, it has been held that a guaranty under seal cannot be revoked without the aid of equity.[1]

But notification by one surety that he desires to be released does not affect the liability of the others.[2]

The death of a surety and notification thereof before the commencement of the cashier's defalcations will not relieve the surety's estate.[3]

§ 37. **No Act of the President or Directors** in violation of their duty to the stockholders can discharge the surety on the bond of a bank officer.[1] See § 33, note 0, and § 38.

[1] § 35. Bank of Wilmington & Brandywine *v.* Wollaston, 3 Harr. (Del.) 90.

[1] § 36. 1 Parsons on Contracts, 515. And see Le Rose *v.* Logansport National Bank, 102 Ind. 332 (1885). Surety may revoke, without cause, on proper notice seasonably given, etc.

[2] Bostwick *v.* Van Voorhis, 91 N. Y. 353.

[3] Shackamaxon Bank *v.* Yard, 143 Pa. St. 129, 22 Atl. 908.

[1] § 37. Fiala *v.* Ainsworth, 68 Neb. 308, 94 N. W. 153 (1903). Minor *v.* Mechanics' Bank, 1 Pet. 46, 7 L. ed. 47. It is no defence that a cashier has done a dishonest, irregular, or improper act, under the express direction of the board of directors, if he knew that their purpose in procuring the act to be done was wrongful. He is bound to obey them, doubtless, and it may be that he would have rejected any participation in the profits of their scheme. But neither his duty of obedience, nor his intention to keep his own hand clear from their illicit gains, are a justification or excuse for his connivance. The guilt that is in the act leavens its entirety.

Where a president and cashier entered into a scheme to defraud, in pursuance of which they gave a certificate in order that the cashier could obtain a fidelity bond, it was not presumed that the president communicated to the bank what he had done to promote the fraud, and the bank recovered on the bond. American Surety Co. *v.* Pauly, 170 U. S. 133, 160, 42 L. ed. 977, 987, 18 Sup. Ct. 552, 563 (1897).

Fault of Another Officer no Excuse

It is no excuse that the defalcation was accomplished by the exercise of a power unlawfully conferred by the directors upon the defaulting officer. And if he acted with the fraudulent connivance of the president, or any one or all of the directors this would only make them partners in crime.[1a] Thus, where a bank authorized its teller to issue due-bills, but had no lawful power to issue such bills or clothe him with such authority, and he accomplished his defalcations by issuing due-bills for his own benefit, it was held that the surety could not avail himself of this illegality in defence to a suit on his bond, and could not set up that the bank could not be compelled to pay the bills.[2]

If a cashier permit a transfer of stock to be made to the bank beyond the amount permitted by the charter, he and his sureties are answerable to the stockholders on his bond for any loss caused thereby, although such transfer was authorized by a resolution of the directors;[3] and so if he permit overdrafts without special excuse.[4] But making an excess loan does not of itself constitute a breach of a cashier's bond.[4a]

The fact that the cashier consented to the bookkeeper's application to his own use of money not due him constitutes no defence to an action on the bookkeeper's bond.[5] This is an ably argued case, and Henry, J., dissented, quoting Bissell *v.* First National Bank, 69 Pa. St. 415, and Caldwell *v.* National Mohawk Valley Bank, 64 Barb. (N. Y.) 333.

The mere fact that the directors sanctioned overdrafts, will not release the liability of a teller's sureties for the consequent loss.[6]

The culpable neglect of the directors and agents of a bank to make frequent examinations of the affairs of the bank, to count the money, and generally to watch over its concerns, according to the direction of the by-laws, is no defence to the sureties in a suit on an official bond. The negligence of one agent, or set of

[1a] Phillips *v.* Bossard, 35 Fed. 99, 100.
[2] Wayne *v.* Commercial National Bank, 52 Pa. St. 343 (1866).
[3] Bank of Washington *v.* Barrington, 2 Pa. St. 29.
[4] Bank of St. Mary's *v.* Calder, 3 Strobh. Law (S. C.) 408.
[4a] Moheensteeher *v.* Westervelt, 87 Fed. 157.
[5] Chew *v.* Ellingwood, 86 Mo. 260 (1885).
[6] Market Street Bank *v.* Stumpe, 2 Mo. App. 545.

agents, cannot deprive the corporation of its remedy for the default of another agent.[7]

Indeed, no act or vote of the directors of a bank, contrary to their duties, and in fraud of stockholders' rights and interests, will excuse the cashier or his sureties from a violation of the stipulation in his bond, well and truly to execute the duties of his office.[8]

§ 38. **Negligence of the Directors** in supervision or failing to discover a defalcation[0] does not discharge the surety as to subsequent frauds;[1] but, as we have seen,[2] careless misrepresentations in ignorance of defalcation that due diligence would have disclosed, constitute a defence if the surety was misled thereby.

On the bond of a cashier of a bank "faithfully and honestly to discharge his duties as such cashier, and faithfully apply and account for all such moneys", etc., "and return the same, on proper demand, to the order of the board", etc., he and his sureties are liable for a loss caused by his negligence, though the directors did not use due diligence.[3]

It is no defence to a suit against the sureties on the bond of a bank cashier, that the directors neglected their duty in not discovering that which the sureties covenanted the cashier should reveal.[4]

A person had been a bookkeeper, and in that position had committed frauds, which had never been detected. He was raised to the position of cashier, and as such furnished a bond, with sureties, for the faithful performance of his duties. He continued, however, to commit frauds of a like general character with those previously committed by him as bookkeeper. Held, that in a suit

[7] Amherst Bank *v.* Root, 2 Met. (Mass.) 541; but see People *v.* Jansen, 7 Johns. (N. Y.) 332. See Fidelity etc. Co. *v.* Courtney, 186 U. S. 342, 46 L. ed. 1193, 22 Sup. Ct. 833 (1902).

[8] Minor *v.* Mechanics' Bank, 1 Pet. 46, 7 L. ed. 47. See also American Surety Co. *v.* Pauly, 170 U. S. 133, 156, 42 L. ed. 977, 987, 18 Sup. Ct. 552, 563.

[0] § 38. The care used by officials in making examinations of the books of the cashier is a question for the jury. Employers' Liability Corp. *v.* Stanley Deposit Bank, 149 Ky. 735, 149 S. W. 1025 (1912).

[1] See Chew *v.* Ellingwood, 86 Mo. 260 (1885), and see § 37.

[2] § 21 *b*.

[3] Batchelor *v.* Planters' National Bank of Louisville, 78 Ky. 435 (1880); Fiala *v.* Ainsworth, 68 Neb. 308, 94 N. W. 153 (1903); Fidelity etc. Co. *v.* Courtney, 186 U. S. 342, 46 L. ed. 1193, 22 Sup. Ct. 833 (1902). See United States Fidelity etc. Co. *v.* Foster Deposit Bank, 148 Ky. 776, 147 S. W. 406 (1912); United States Fidelity etc. Co. *v.* Foster Deposit Bank's Receiver, 153 Ky. 698, 156 S. W. 371 (1913).

[4] Frelinghuysen *v.* Baldwin, 16 Fed. 452.

by the bank to recover from the sureties on the bond for the frauds committed during the cashiership, it could not be shown in defence that the frauds committed by him as bookkeeper would have been discovered had the officers of the bank not been grossly derelict in the examination of the books of the bank. "The object of the bond is to guarantee to the bank the faithful performance by the cashier of his duties. His duties and obligations are not affected by the negligence of the other officers or agents of the bank, and such negligence does not discharge his sureties." It is also a *quære* whether, if the officers of the bank had had knowledge of the frauds of the principal as bookkeeper, and had failed to communicate such knowledge to the sureties on his bond as cashier, these sureties would thereby have been discharged.[5] To decide such a *quære* against the sureties would be a great hardship upon them, not easily capable of justification.

§ 38 A. **Notification of Default.** — When a bond requires that "immediate notice" be given to the surety upon discovering default of an officer, the word "immediate" means within a reasonable time; and it is proper to leave to the jury the question whether or not a notice given within ten to seventeen days after discovery of default is given with reasonable promptness.[1]

§ 39. **Ultra Vires** action by the bank is no defence, as if the bank commenced operations contrary to charter, or has failed to perform its public duties, as in reference to redeeming its notes.[1] And, where a bank had no express authority to establish a "branch" at which the cashier was engaged, it was held no defence to an action on his bond.[2]

§ 40. **Effect of Failure to take the Required Oath or Informality in Appointment.** — The fact that the officer did not take the oath of office which was required by statute prior to entering upon the exercise of his functions, does not operate to vitiate his bond. Being one of the duties prescribed for him to do, his neglect to do it may be itself a breach of the condition of the bond.[1] And so

[5] Tapley *v.* Martin, 116 Mass. 275. See United States *v.* Kirkpatrick, 9 Wheat. 720, 6 L. ed. 199; Inhabitants of Farmington *v.* Stanley, 60 Me. 472.

[1] § 38 A. Fidelity etc. Co. *v.* Courtney, 186 U. S. 342, 46 L. ed. 1193, 22 Sup. Ct. 833 (1902); Employers' Liability Assur. Corp. *v.* Stanley Deposit Bank, 149 Ky. 735, 149 S. W. 1025 (1912).

[1] § 39. Hughes *v.* Bank of Somerset, 5 Litt. (Ky.) 45; Wallace *v.* Exchange Bank, 126 Ind. 265, 26 N. E. 175. See § 722.

[2] Morehead Banking Co. *v.* Tate, 122 N. C. 313, 30 S. E. 341 (1898).

[1] § 40. State Bank *v.* Chetwood, 3 Halst. (N. J.) 1.

far as it is a breach of the duty of the directors, it is covered by the principles of § 38.

The surety cannot escape liability on the ground that his principal was never duly appointed or legally qualified.[2]

§ 41. **Express Limitation of Risk.** — If the bond stipulates that a certain sum only shall be left in the custody of the clerk, and a larger sum be left, the bond is not thereby avoided. The nomination of the sum will be construed, unless clearly otherwise expressed, to be a limitation of the liability of the surety.[1]

The principles of §§ 37 and 38 apply in such cases, and the rule that the substantial object of the bond, namely, indemnity against loss by fault of the officer under the circumstances of ordinary business in his office, will be kept in mind, and the bond so construed as to make it available to this end, unless the limitations are so clearly adverse that they will not bear a construction in harmony with that rule.

§ 42. Notes on Evidence, Measure of Damages, and Practice and Pleading in General.

(*a*) **Evidence.** — 1. In a suit to recover a deficiency in money, or the value of securities which ought to be but are not forthcoming, it is sufficient for the bank in the first instance to allege and prove that they came into the hands and possession of the officer, and have not since been returned or accounted for by him. These facts, laid in the declaration and satisfactorily established on the trial, suffice to create a presumption that the missing property has been wasted or misappropriated by the officer. If the deficiency is in the money, or uninvested funds of the bank, it is not necessary for the bank to declare or to prove the receipt, at certain times, of specific sums by the cashier, from individuals named, and to allege these particular sums to have been since lost or converted. Obviously this would be at once a useless and an impossible requirement. All the sums paid into the bank are usually blended into one aggregate mass, and the waste, loss, or embezzlement in the great majority of cases takes place from this. If at any time an officer should lose or embezzle the whole of any especial sum taken by him at one time from an individual, it would probably be totally impossible for the bank to assure itself of the fact. Consequently it is incumbent upon the bank to allege and prove simply that the officer has received a certain amount as a sum total, and that he has returned or accounted for a less amount, likewise as a sum total. If then the defendants seek to rebut the presumption of his liability for the difference which, unless they do so, becomes conclusive and supports a judgment against them, the burden is shifted upon them to allege and show that the deficiency occurred in some manner such as to relieve them from a liability, under the bond, to make it good. If to this end they intend to

[2] Board of County Com'rs *v.* State Bank, 64 Minn. 180, 66 N. W. 143.
[1] § 41. Lindsay *v.* Lord Downes, 2 Ir. Ed. 307. See the cases in § 42.

rely upon the innocent mistake of the officer, or upon a robbery from him, either of which is a sufficient defence (Walker *v.* British Guarantee Association, 18 Q. B. 227, also the cases cited below in the discussion of this topic), they must set forth the time, place, and other circumstances attendant upon the mistake or theft, with such certainty, if possible, as to show that it befell while the officer was acting duly and properly in the discharge of his functions according to the ordinary rules and customs of the business. It is not sufficient for them to show simply that the explanation is a reasonable or a probable one; they must maintain it affirmatively as a positive fact. Allison *v.* Farmers' Bank, 6 Rand. (Va.) 204; Minor *v.* Mechanics' Bank, 1 Pet. 46, 7 L. ed. 47; American Bank *v.* Adams, 12 Pick. (Mass.) 303; Morris Canal & Banking Co. *v.* Van Vorst, 3 Zabr. (N. J.) 98.

For proper allegations in suit on a contract of a fidelity company to make good losses occasioned by misconduct of an employee, see Fidelity Co. *v.* Gate City Bank, 97 Ga. 635, 25 S. E. 392 (1895).

2. But the proof which will be required must be in accordance with the intrinsic nature of the fact itself. It would be seldom, for example, that a paying teller could show, with the certainty of demonstration, especially after the lapse of much time, that he had overpaid certain amounts on certain checks. The question would seem to be eminently fit for the decision of a jury, though in the case of the American Bank *v.* Adams the court declared, as if it were a matter of law, that the evidence adduced was insufficient to sustain the defence of an innocent overpayment. The evidence was that the teller was considered to be honest, careful, and vigilant; that the directors had stated their belief that the loss occurred through overpayments; that they had since continued to employ the teller in duties of trust and confidence; and that similar innocent losses befell tellers so frequently that they might be regarded as unavoidable incidents to the business of the office. The court said that all this doubtless went strongly to repel the notion of want of integrity, but nevertheless was not sufficient to "prove the specific mode of the loss"; the defendant must maintain his justification affirmatively. It is not to be supposed, however, that the intention of the court in delivering this opinion was to signify that the question of fact, to wit, what was the real cause of the loss, was to be taken from the forum of the jury. Their language should rather be construed as a criticism made upon the evidence offered in a certain cause, and serviceable in suggesting the instructions which may in an appropriate case be given to a jury to guide them in weighing the testimony which is before them. It is clear that, though the court may declare as matter of law that the jury shall not regard proof of a probability established by testimony of a purely general character as equivalent to definite proof of a specific fact, yet still it must remain for the jury, in subjection of course to this rule of law, to determine whether or not that specific fact is proved to their reasonable satisfaction.

3. If the plaintiffs assert that the officer has received a certain amount which he has never accounted for, it will be proper for the defendants to deny that he has ever received the amount. This leaves the burden of proving the receipt upon the bank. But if the defendants only answer that the officer has accounted for all that he has ever received, they have the onerous task of proving the correctness of both sides of the account, and of making them balance. They in fact relieve their adversaries of nearly all that work which would otherwise have to be done in establishing a *prima facie* case. Furthermore, if they deny the receipt, they may

still plead excuses, if the receipt should be proved, which they could not do if they had adopted the other form of answer. Exeter Bank *v.* Rogers, 6 N. H. 142.

There must be evidence of an actual loss to the bank. Thus in a suit upon a teller's bond it is not enough to show that he made an error of $1000 in adding items in the depositors' column. Commonwealth *v.* Strickler, 178 Pa. St. 148, 35 Atl. 628, also Mohrenstecher *v.* Westervelt, 87 Fed. 157 (1898).

Entries made by the clerk in the books kept by him in the course of his duties will, after his death, be evidence, against the sureties in his bond of his receipt of the moneys therein entered as received. Whitnash *v.* George, 8 B. & C. 556. See, also, State Bank *v.* Brown, 96 App. Div. 441 (1904), 89 N. Y. S. 381, holding that the books of a bank may be introduced to show the amount of the cashier's embezzlement, where part of the entries were made by the cashier and part by clerks of the bank who swore that their entries were true, and part by a clerk who had died before the trial.

(*b*) **Measure of Damages.** — The obligation may be in any sum which the directors see fit. Though it is not probable that they would be allowed to recover any designated sum as "liquidated damages" in all cases, neither any money in the nature of vindictive or penal damages, at least from the sureties. From them the recovery should be limited to the actual amount of the loss. The bond is strictly for reimbursement, not for either punishment or profit. This character imperatively fixes the measure of damages at the amount of actual pecuniary loss or injury which the bank has sustained. The rule was thus laid down in Bank of Washington *v.* Barrington, 14 Serg. & R. (Pa.) 405, where it was also said that only the injury naturally and in the ordinary course of business arising from the misconduct could be recompensed. *Remote results* cannot be proved against the sureties; much less, results which are in a measure due to negligence or ignorance of the directors in the events transpiring after the malfeasance.

If an officer converts bills, notes, or other species of the promises to pay of the bank, on which it legally owes money, recovery upon the bond may be had for the full nominal value. The defendants cannot avail themselves of any depreciation in the marketable value of the converted paper or securities. Pendleton *v.* Bank of Kentucky, 1 T. B. Monr. (Ky.) 171. This is the only exception, if indeed even this must necessarily be regarded as such, to the general rule, that the bank can recover only the amount of its real and actual loss. Bank of Washington *v.* Barrington, 2 Pa. St. 27.

(*c*) **Pleading and Practice.** — 1. The precaution which should be observed by defendants in a suit wherein the plaintiffs seek to recover the amount of an alleged deficit has already been noticed (p. 95). A few more points deserve mention.

In suits for breach on the part of the officer of the condition of his bond, it is sufficient to aver non-performance in the words of the bond. The specific acts relied on as constituting the breach and sustaining the allegation of it may be made when required at a later stage in the proceedings. Pendleton *v.* Bank of Kentucky, *supra;* Chetwood, at the suit of the President, etc., of the State Bank, 2 Halst. (N. J.) 32.

The defendants cannot deny the contents of the bond, set out in or made a part of the plaintiff's declaration, after they have admitted by their plea its execution, delivery, and approval. So if the bond recites that the principal is cashier, etc., or describes or designates him as cashier,

etc., a surety, who has admitted the whole bond in his pleadings, cannot thereafter deny the fact that the principal really filled the office which was thus stated or designated in it. Milburn *v.* State of Maryland, 1 Md. 1; State Bank *v.* Chetwood, 3 Halst. (N. J.) 1.

It has been declared in general terms in California, though not in a banking case, that official bonds are joint and several. People *v.* Jenkins, 17 Cal. 500. In fact, the bond may be made either joint or several, or both, by its own phraseology. The California decision can only be regarded as intimating that the tendency of the courts, in all cases where the language is doubtful or reasonably admits of the construction, is to regard such undertakings as joint and several. Where this is the sound construction, the bank may either sue any one of the parties singly, or it may sue them all together. But it cannot sue any intermediate number. Its option is strictly confined to a suit against one only, or against the whole. Of course, if it neglects this rule, and does sue more than one party and less than all, the defendants can only take advantage of the error by a plea in abatement, and will waive it by a plea to the merits. Minor *v.* Mechanics' Bank, 1 Pet. 36, 7 L. ed. 47. Where a bond is given by a principal in a certain sum, and by two sureties in a much less sum each, the obligation of the sureties is several; either one of them may be sued singly, and recovery may be had from him to the full amount of said less sum, provided this is not greater than the amount of the loss or injury sustained. Stetson *c.* City Bank, 12 Ohio St. 577.

Answer by defendants that the officer had made and executed his promissory note in full satisfaction, and that it had been accepted and received in full satisfaction, was held to be sufficiently met by a denial only of the making and executing. Morris Canal & Banking Co. *v.* Van Vorst, 3 Zabr. (N. J.) 98.

2. Where the obligation of the officer and his sureties is joint, and they are jointly sued thereon, the admissions and declarations of the officer are admissible in evidence against all the defendants alike. Amherst Bank *v.* Root, 2 Met. (Mass.) 522; Pendleton *v.* Bank of Kentucky, 1 T. B. Monr. (Ky.) 171. But the language in the Massachusetts case cited points directly to the important qualification that this joint character of the obligation and of the suit must be taken to be essential to the operation of the rule; and that if the undertaking of the surety were a separate and independent one, and probably even where it was joint and several and he alone was sued upon it, precisely the opposite doctrine would obtain. This view of the law is hardly sustained by the Kentucky case cited; and Grant says that the English principle is, that "whatever is evidence available against the principal is available against the surety." But though he makes this statement so broadly, he cites no authority which sustains it quite to its full extent. The case which he gives declares simply that, in a suit against the surety after the death of the principal, entries by the latter, in his official books, of receipts of money, were evidence in behalf of the bank that these sums had been received, upon the ground that the bond itself also guaranteed the faithful keeping by the same officer of these very books. Grant on Bankers and Banking, p. 257, citing Whitnash *v.* George, 8 B. & C. 556.

In suit against the principal and sureties on a cashier's bond, their liability being by the terms of the bond several and not joint, it was held that, under the Practice Act of Massachusetts, all three might be joined as parties defendant in one and the same action. Grocers' Bank *v.* Kingman, 16 Gray (Mass.), 473.

3. It cannot be set up in defence to a suit upon a bond that the bank commenced operations in a manner contrary to its charter; neither that it has failed to perform its public duties in redeeming its circulating notes. Such matters cannot be introduced thus indirectly, neither are they available for the purpose of absolving a debtor from his liability. Hughes *v.* Bank of Somerset, 5 Litt. (Ky.) 45. Nor is it a defence that the bank had no authority to establish the branch bank at which the cashier was engaged. Morehead Banking Co. *v.* Tate, 122 N. C. 313, 30 S. E. 341 (1898).

Two or three English cases should be noticed in this connection before dismissing the subject.

A clerk who had fraudulently misappropriated considerable sums, died before discovery, leaving considerable personalty and no will. His widow deposited the personalty with the banking-house and took out letters of administration. She then sought to recover the personalty, which the bankers sought to retain. She sued them, and they filed a bill against her, asking for an injunction and for leave to administer on the estate. It was held to be no answer to the bill to reply that it alleged a felony, and that no civil remedy lay in respect thereof. Wickham *v.* Gatrill, 2 Sm. & G. 353.

The father of a banker's clerk transferred stock into the name of the banker, in order to cover defalcations of his son. Held, that this was a composition of a felony to prevent a prosecution. *Semble*, that the father could not recover the value of the stock, nor obtain an order for its transfer back to himself. Claridge *v.* Hoare, 14 Ves. Jun. 59.

A clerk, who had embezzled, prior to conviction deposited with the banking-house certain title deeds which he possessed, and transferred to them some policies of insurance upon his life, as security, so far as they would go, for the money taken. The bankers, however, thereafter pushed the prosecution to conviction, whereupon the clerk sought to recover back what he had transferred. The court said that the amount which the clerk had embezzled was a debt owing from him to his employers; that it constituted a good and sufficient consideration for his transfer to them of the aforesaid securities; and that they were entitled to hold and realize upon these. Chowne *v.* Baylis, 31 Beav. 351; Grocers' Bank *v.* Kingman, 16 Gray (Mass.) 473.

Pendency of a suit by a bank against its cashier, for breach of his bond in permitting an overdraft, does not affect the bank's right to set up the overdraft as a counter claim to a demand by the cashier's assignee. St. Louis School Board *v.* Broadway Savings Bank Estate, 84 Mo. 56 (1884).

In an agreement and mortgage, given to indemnify a bank for the thefts of an officer, the word, "indebtedness", covers not only the thefts of the officer, but also those of his employees occurring by his connivance or negligence. Latimer *v.* Veader, 20 App. Div. (Hun, N. Y.) 418 (1897).

(*d*) **Surety's Right to Demand and Notice.** — 1. No demand need be made upon a surety prior to bringing suit against him. Pierce *v.* Williams, 23 L. J. Exch. 322; Grocers' Bank *v.* Kingman, 16 Gray (Mass.) 473. Neither is he entitled to prompt notice of a loss covered by his obligation. The bankers may continue to employ the principal and cloak the fact of the loss so long as they like, saying nothing about it to the surety, and concealing it even from their own employees by a false entry on their books of a loan to the clerk of the amount. Grant, p. 259, citing Peel *v.* Tatlock, 1 Bos. & P. 419. This law was practically established by

the jury, who seem to have thought that there was nothing in the obligor's contract with the bank which put it under any obligation to look after his interests in the way of notifying him of the occurrence of a loss. Nor is the rule devoid of reason, for the surety incurs no risk on the ground of being deprived of the opportunity at once to withdraw and annul his suretyship, and so to save himself from further loss; for we have already seen that no new liability can accrue against him if the bank continues to employ the officer after knowledge of his misconduct. And even if this last rule should ever be construed, as is within the bounds of possibility, to apply only to cases where the officer's misconduct has been fraudulent, or otherwise wrongful in its character, and not to apply where his default has been simply the result of incompetence, ignorance, or carelessness, still it is not improbable that, if the sureties wish to secure the right to be notified even of such acts, they must insert express stipulations to that effect in their undertaking with the bank. If they neglect to take such precautions in their own interest, the law may well refuse to interfere to protect them from the results of their own laches, except in cases which are tainted with actual wrong-doing.

2. Where the contract of the surety stipulated for notice to be given to the surety on discovery of fraud or dishonesty on the part of the principal, the bank is not required to exercise any diligence to watch this particular employee, and, knowledge on the part of the bank's cashier of any misconduct of the principal (he being a co-employee) is not imputable to the bank itself. Fidelity Co. *v.* Gate City Bank, 97 Ga. 637–641, 25 S. E. 392 (1895).

3. A bond requiring the bank to give notice of cashier's fraud, "as soon as practicable after such act shall have come to the knowledge of the employer", does not require notice of any act of cashier that might involve loss, unless the bank has knowledge, not merely suspicion, of such facts as would justify a careful and prudent man in charging another with fraud and dishonesty. American Surety Co. *v.* Pauly, 170 U. S. 133, 147, 42 L. ed. 977, 987, 18 Sup. Ct. 552, 563 (1897). See also p. 153.

When a bond requires "immediate notice" to be given to the surety upon discovering default of an officer, the word "immediate" means within a reasonable time, and it is proper to leave to the jury the question whether or not a notice given within ten to seventeen days after discovery of default is given with reasonable promptness. Fidelity etc. Co. *v.* Courtney, 186 U. S. 342, 46 L. ed. 1193, 22 Sup. Ct. 833 (1902); Employers' Liability Assur. Corp. *v.* Stanley Deposit Bank, 149 Ky. 735, 149 S. W. 1025 (1912).

4. Where the loss was discovered in the latter part of May and proofs of loss were mailed to surety company on June 24, and, no objection was made upon receipt either as to their being received in time or their sufficiency it was held that notice was given "as soon as practicable" as required by the bond in (3) *supra*. American Surety Co. *v.* Pauly, *supra*. See Fidelity etc. Co. *v.* Courtney, 186 U. S. 342, 46 L. ed. 1193, 22 Sup. Ct. 833 (1902).

CHAPTER IV

BY-LAWS AND THEIR EFFECT

§ 43. By-Laws.
Power to make is inherent, at common law, in the stockholders, though often given to directors in the organic law.
Extent of the power.
A valid by-law must be
Passed by the proper authority.
Not contrary to the charter or statute law, nor public policy, nor *beyond* the charter powers, nor against common right, nor unreasonable.
Examples of good by-laws, n. 10.
Effect by By-Laws.
(*a*) As to members,
as by-laws.
as contracts.
(*b*) As to third parties,
directly.
indirectly.
(*a*) Enforcement by By-Laws.
Invalid By-Laws, n. 7, 8, 9.
Establishing a lien on stock. § 698.
Of savings banks. § 620.
amendment of. § 620.
as to production of pass-book. § 620 *b*.
part of contract with depositor. § 620 *a*.
payment contrary to. § 620 *e*.

§ 43. **By-Laws and their Effect.** — The power to make by-laws for the government of the corporate affairs is at common law inherent [1] in the body of stockholders,[2] but is often expressed in the charter or statute [3] and reposed in the board of directors,[3] and when the organic law gives the power for purposes named, power to make them for other purposes is impliedly excluded.[4]

By-laws to be *valid* must be, — (1) Passed by the proper author-

[1] § 43. Norris *v.* Staps, Hob. 210*b*.
[2] Union Bank *v.* Ridgely, 1 Harr. & G. (Md.), 324; Fed. Res. Act. Part II, § 104.
[3] See Part II.
[4] Child *v.* Hudson Bay Co., 2 P. Wms. 207.

ity, as, if the power lies with the directors, a majority is necessary to constitute a quorum to pass by-laws,[5] unless a special provision alters this common law rule.[6] (2) Not inconsistent with charter or statute law,[7] nor beyond the powers given in the organic law,[7] but the bank may renounce by by-law a privilege given by the organic law, but not a duty imposed by it. (3) Not in violation of public policy or common right, as settled by the principles of the common law, unless such infringement is expressly authorized by the organic law.[8] (4) Not unreasonable. The power is for the benefit of the whole corporation, and all by-laws that are unequal, oppressive, vexatious, or plainly detrimental to the interests of the bank are void,[9] but the unreasonableness must be demonstrated[10] and the question is for the court.[11] This covers

[5] Cahill *v.* Kalamazoo Ins. Co., 2 Dougl. (Mich.) 124.

[6] Hoyt *v.* Shelden, 3 Bosw. (N. Y.) 267. A by-law specifying the number of directors constituting a quorum held valid.

[7] Kennebec R. Co. *v.* Kendall, 31 Me. 470; Hoyt *v.* Thompson, 19 N. Y. 207; Corydon Deposit Bank *v.* McClure, 141 Ky. 481, 133 S. W. 201 (1911). Such by-laws as the following are void as inconsistent with, or beyond the powers granted in the charter: — (1.) By-laws creating a new office. Rex *v.* Ginever, 6 T. R. 732. (2.) Giving a vote to one not entitled, or restricting the right of voting. Rex *v.* Bird, 13 East 384; McCullough *v.* Annapolis R. Co., 4 Gill (Md.) 58. (3.) Altering the mode of election or qualifications for eligibility to office, as requiring a certain number of shares for admission, or office, or giving a vote for every share. Taylor *v.* Griswold, 2 Green (N. J.) 223; Powell *v.* Regem, 2 Bro. P. C. 298. (4.) Imposing a liability for debts of the corporation. 13 Met. (Mass.) 539. (5.) A by-law embracing not only members, but strangers beyond the legislation of the bank, would be void. Dodwell *v.* Oxford, 2 Vent. 34.

[8] Taylor *v.* Griswold, 2 Green (N. J.) 223.

[9] As a by-law that mistakes in payment will not be rectified after the person leaves the bank. Farmers' Bank *v.* Smith, 19 Johns. (N. Y.) 115. By-laws taking away the right of members to legal redress. Player *v.* Archer, 2 Sid. 121. Retrospective by-laws are void, both at common law and under the United States Constitution, being *ex post facto*, as the bank has only such powers as the legislature gave, and the State could not give a power it did not itself possess. Howard *v.* Savannah, T. Charlt. (Ga.) 173. A by-law levying taxes, or depriving of property, is void. Unless so provided in the articles of association or other organic law, a company cannot interfere with the rights of property and dealings with third persons, as by creating a lien on stock, or refusing to transfer until the stockholders' debt to the company is paid, and a *bona fide* purchaser without notice of such by-law can compel the company to transfer the stock to him on its books. Driscoll *v.* West Bradley Manuf. Co., 59 N. Y. 96.

"The bank cannot by its by-law tie the chancellor's hands or disable itself from performing its duties to others." Letcher's Trustee *v.* German National Bank, 134 Ky. 24, 119 S. W. 236 (1909).

[10] Paxson *v.* Sweet, 1 Green (N. J.) 196.

[11] Commonwealth *v.* Worcester, 3 Pick. (Mass.) 462.

much of the same ground as (3), and is subject to the same exception.

a. **Effect of By-Laws on Members.** — 1. A *valid* by-law binds [12] each member as though a part of the charter, even though he was not a member when the by-law was passed,[13] and the bank may enforce the penalty by suit in an action of debt or assumpsit ; [14] and there may be other methods of enforcement besides pecuniary penalties, as by suspension of the power of voting,[15] but not by imprisonment nor forfeiture of goods, as of the shares of the member, unless such power is specially given in the organic law.[16]

For examples of binding by-laws, see note 12.

2. An *invalid* by-law has no effect whatever *as a by-law* upon anybody. But as a *contract* it may be good as against members or others who assent to it,[17] but the assent must be actual. The assent of absent members is only presumed in reference to legal votes of a corporate meeting.[18] Of course this contract rule can apply only to by-laws void merely because they infringe on rights which, though secured by common law, are still such that the owner can waive or part with them by agreement ; no by-law void because contrary to charter, statute, public policy, or morality, can take effect as a contract or otherwise.[19]

b. **Effect of By-Laws on Third Persons.** — The effect of invalid by-laws has just been noted.

Valid by-laws have no effect, as by-laws, on strangers, that is, persons not members of the corporation, unless by statute they have been made obligatory on such persons.[20]

[12] The bank may enforce its right to the service of members by a by-law imposing a penalty on those who refuse to serve in office, or to take the oath of office, or members who refuse to attend meetings. Rex *v.* Weymouth, 7 Mod. 374 ; Tobacco Pipe Makers *v.* Woodroffe, 7 B. & C. 838. So the refusal to continue in office. Planters' Bank *v.* Lamkin, R. M. Charlt. (Ga.) 34.

[13] Susquehanna Ins. Co. *v.* Perrine, 7 Watts & S. (Pa.) 348. A member assents by the fact of membership to all valid by-laws, whether he knows of them or not.

[14] Tidd's Prac. 3, 4. [15] Commonwealth *v.* Cain, 5 S. & R. (Pa.) 510.

[16] Barter *v.* Commonwealth, 3 Penn. & W. (Pa.) 253 ; Hart *v.* Albany, 9 Wend. (N. Y.) 571 ; Cotter *v.* Doty, 5 Ohio 395 ; Mobile *v.* Yuille, 3 Ala. 137 ; State *v.* Morris R. Co., 23 N. J. L. 360.

[17] Cooper *v.* Frederick, 9 Ala. 738 ; Slee *v.* Bloom, 19 Johns. (N. Y.) 456 ; Stetson *v.* Kempton, 13 Mass. 282.

[18] Insurance Co. *v.* Connor, 17 Pa. St. 136 ; Stetson *v.* Kempton, 13 Mass. 282.

[19] Adley *v.* Whitstable Co., 17 Ves. 323.

[20] As in Soper *v.* Harvard College, 1 Pick. (Mass.) 177, where a State

But such by-laws may indirectly affect third persons. Just as any contract or arrangement between A. and B. may affect the dealings of C. with either, by limiting the power of A. or B., or by reason of C.'s knowledge of the arrangement and contracts in reference to it. In the same way as a usage peculiar to a single bank may,[21] — (1) by bearing on the actual authority [22] of an officer in dealings with such persons; (2) by determining the right of a member to deal in a certain way with such third persons, and bind the rights of the bank thereby, as in case of by-laws concerning the transfer of stock; (3) by entering into transactions so as to affect parties who employ the bank to act for them whether they know of the by-laws or not; [18] (4) by affecting transactions into which such persons enter, being reasonably aware that the bank will be a factor in the transaction, and having actual knowledge of the by-law; [18] (5) and by the consent in any other way of the said third person to be bound by the said by-laws.

A by-law may be the root from which will come a usage, that shall grow into common law, and roof all with its shade.

statute had forbidden innkeepers to give credit to the students, in violation of any rules of the College.

[21] See § 9 *e*.

[22] A person dealing with a corporation officer, whose duties are regulated by the by-laws, is chargeable with notice of the limitations of his authority contained in charter and by-laws (Dabney *v.* Stevens, 40 How. Pr. N. Y. 341), unless the bank has held out the officer to such person as having more authority than is actually the case, and even this, though of superior force to by-laws and private instructions, cannot give third persons a right to infer authority beyond charter limits. Marsh *v.* Fulton County, 10 Wall. 676, 19 L. ed. 1040; Clark *v.* Des Moines, 19 Iowa 199. Every one must take notice of the restrictions in the articles of association and the rest of the organic law.

CHAPTER V

BUSINESS OF THE BANK. — TIME AND PLACE

§ 44. The Six Questions.
§ 45. Time. When can a bank do business.
Beginning. II. §§ 12, 17.
Doing business before it is authorized.
"Exercise of Privilege" requires a *de jure* corporation.
Ordinary business, a *de facto* corporation.
Only the State can object. § 726 *d*, *e*; § 758 cases.
End of business. §§ 763, 766; II. § 46.
(*a*) Banking hours. §§ 646, 647.
Judicial cognizance of.
Reasonableness of, — what is reasonable as to banking business may not be reasonable as a limitation upon the business of others, as delivery by an express company.
§ 46. Place. §§ 69 *a*, 168; II. §§ 41, 108 *g*, 141 L.
Legal home in State where created or located.
Cannot take its franchises into another sovereignty, but may do ordinary business in another State through agents, if it
(*a*) has power to do the business under its charter, and there is nothing to prevent in the law of its own State or that in which it undertakes to do the business.
(*b*) May buy a bill of exchange in another State.
(*c*) May hold land.
(*d*) Cannot issue bank notes in another State.
(*e*) Nor have an agency for deposit.
(*f*) Place of a national bank is the locality named in its organization certificate.

§ 44. **Six Questions naturally arise.** — When can the bank do business? Where must it be done? What business can it do? How is the business to be done? What rights, duties, and liabilities arise in doing it? and, What is the effect of the acts of a bank beyond its authority?

§ 45. **Time.** — A bank can begin business as soon as it has obtained its charter and fulfilled the antecedent conditions of its organic law, if any. Under the State statutes generally, the organization certificate must be duly filed, and a specified portion

of the capital paid in.[1] Under the National Banking Act the execution of the organization certificate makes the bank a body corporate, but no business except that incidental to its own internal organization can be done until authorized by the comptroller to commence the business of banking.[2] And under sec. 5134 of the Act, a National Bank is precluded from leasing a banking house before it is authorized to do business, and in such case may set up the plea of *ultra vires* against a claim for rent.[2a]

Bank Doing Business before it is Authorized

If a bank in fact enters upon the exercise of business powers before it has a right to (as if by some irregularity or informality it is not legally constituted a bank with the legal powers of one), no objection on this ground can be raised by any private person to avoid a just liability arising from such transaction,[3] nor can the bank raise such objection when sued.[3a] If the contract is executory, then and only then may *ultra vires* be set up as a defense (see *Ultra Vires*); but if the act of the bank is the exercise of a *privilege* (or power to do an act of a nature beyond the right of an individual, and in contravention of the common rights of others, which only the sovereign can do or authorize), it is not enough for it to be a *de facto* corporation, it must be a corporation *de jure*;[4] for no one shall infringe upon the liberties or property of others except when duly authorized. See § 726.

This reason does not apply to the cases above, in which a *de facto* bank lends money, receives deposits, or does other acts in the nature of contract, and which do not involve the exercise of privilege. Justice between the parties in such matters is not

[1] § 45. R. L. of Mass. c. 115, § 3. One half must be paid in specie, and examined by the commissioners. Same with national bank. See Part II. § 14.

[2] See Part II. § 8. Long *v.* Citizens' Bank, 8 Utah 104, 29 Pac. 878.

[2a] McCormick *v.* Market National Bank, 162 Ill. 100, 44 N. E. 381; Suberger *v.* McCormick, 178 Ill. 404, 53 N. E. 340 (1899).

[3] Allison *v.* Hubbell, 17 Ind. 559; Southern Bank *v.* Williams, 25 Ga. 534; Bank of Port Jefferson *v.* Darling, 91 Hun (N. Y.) 236; Bair *v.* Bank, 27 Neb. 577, 43 N. W. 347 (1895); Platt Valley Bank *v.* Harding, 1 Neb. 461; Missouri Valley Land Co. *v.* Bushnell, 11 Neb. 192, 8 N. W. 389; Exchange National Bank *v.* Capps, 32 Neb. 242, 49 N. W. 243 (1891).

[3a] Kellogg *v.* Douglass Bank, Same *v.* Latham, Same *v.* Chemical National Bank, 58 Kan. 43, 48 Pac. 587 (1897).

[4] N. Y. Cable Co. *v.* Mayor, etc., of N. Y. 143, 10 N. E. 146.

affected by any question of the bank's proper organization. § 726.

The *bank* can never take advantage of its own wrong to avoid liability for tort, or on a contract implied upon the facts, or any just liability in the case. For instance, stockholders cannot escape their usual liability to redeem circulation because of irregular organization of the bank.[5]

The termination of a bank's power to do business will be considered under the heads of Dissolution (§ 766) and Forfeiture (§ 722). It may be noted here, that the mere happening of such a breach of law as may cause forfeiture may not of itself affect the business powers of the bank. Its subsequent acts are valid, for the State may waive the forfeiture, and the right of the bank to continue its business remains until forfeiture is judicially declared.

All these rules may be altered by express legislation.

(*a*) **Banking Hours.** — Between the boundaries above, the bank may adopt *reasonable* (and what is reasonable varies according as the rule affects only banking business or the business of others as well) rules and usages concerning the hours of each day within which it will do business. Such a usage will be *judicially recognized.* The remainder of this section is devoted to these two points, the judicial recognition and the reasonableness of banking hours.

Judicial Cognizance

Whether or not the courts will take judicial cognizance of what are banking hours in any particular place is, of course, a question which must be decided specially concerning that particular place.[5a] Undoubtedly, no court would take judicial cognizance of the banking hours of any place not lying within the area of the jurisdiction of the court.[5b] The English courts take judicial notice of what are banking hours in the "city", so called, of London;[6] but in other parts of London, and in other cities and towns, the hours must be proved.[7] The fact of what was the hour for closing a cer-

[5] McDougald *v.* Bellamy, 18 Ga. 411.

[5a] If the court should take judicial notice of the usual banking hours it must also take judicial notice that banks sometimes depart from their usual custom and accommodate their customers after business hours. Lowry National Bank *v.* Seymour, 91 S. C. 305, 74 S. E. 648 (1912).

[5b] See Columbia Banking Company *v.* Bowen, 134 Wis. 218, 114 N. W. 451 (1908).

[6] Parker *v.* Gordon, 7 East 385; Jameson *v.* Swinton, 2 Taunt. 224.

[7] Hare *v.* Henty, 10 C. B. N. S. 65.

tain bank in the city of New York was also found, as an essential fact, by the court, in reporting a case for decision of questions of law.[8]

" Banking hours " are so far recognized by the courts that any transaction in the ordinary course of banking business, which is to be had with the bank upon any day, must be had within " banking hours " upon that day. Thus, a notice left with a bank after expiration of such hours on any day is operative as notice only at and from such later time as, in the ordinary course of business, it is opened and read.[9]

Reasonableness

If a bank should say it would pay deposits only during a certain five minutes each day, that might be considered unreasonable, and when the limitation affects the time within which others may perform their peculiar business, as, for example, when an express company may deliver packages to the bank, a different standard of reasonableness applies from what is proper when the rule only affects the hours within which the public may avail themselves of the facilities of the bank.

A rule that the bank would not receive deposits after three o'clock would be reasonable, and though the officers should remain in the bank an hour or two they would not be bound to receive deposits after that time; but when the rule regulates, not banking business, but the business of a carrier, for example, the convenience of the latter must be considered as well as that of the bank.

In a Wisconsin case,[10] the bank had after banking hours received packages coming on a certain train by express many times, the teller being usually the receiving officer. The express agent on the day of the trouble offered a package to the teller, in the bank after hours, but at such time as they had been often before received, the package having come on the train just mentioned. The teller said, " Fred, you will have to take the package back with you, for the cashier has gone to tea." The courts said, that what are reasonable hours for receiving deposits, discounting bills, etc., are not necessarily reasonable hours for receiving express packages, and a bank cannot declare it will not receive from a

[8] Salt Springs National Bank *v.* Burton, 58 N. Y. 430.
[9] Calisher *v.* Forbes, 41 L. J. Ch. 56.
[10] Marshall *v.* American Express Co., 7 Wis. 1.

carrier after what it calls banking hours, and thereby thrust on him a continuance of his extraordinary responsibility; the carrier after such offer is a gratuitous bailee.

In Kentucky the court said, in substance: "In the absence of proof of usage in New Orleans as to delivery within banking hours, or of any reference to banking hours in the contract with the carrier, we do not perceive that, as matter of law, the right to deliver a box of specie is restricted to banking hours. *If in making or offering to make the delivery the convenience of the person who is to receive, and the safety of the commodity after it is received, are to be regarded, as they probably should be, to a reasonable extent,* it would seem sufficient if the offer were made at any time of the day when the business houses of the city were open, and when convenient means were at hand for the safe transportation of the article from the wharf." [11]

Discussion of these Cases

In this case the *consignee of the specie was not a bank,* but a private person, and though he desired to deposit in bank, nothing had been said to the carrier about delivery with reference to this purpose. But suppose a bank has a vault with a time lock, would it be reasonable to hold good a delivery after that lock was set, even though some of the officers might be found in the bank? And an offer to deliver when the bank is shut and the officers gone is clearly bad.[12] If, as the Kentucky judge said above, the convenience of the consignee and the safety of the commodity are to be regarded, it would seem clear that, when the bank has closed its vaults and the officer who can open them is gone, or if they are fastened with time locks, it would not be reasonable to hold the bank bound to receive the money, unless, as in the Wisconsin case, there was a *custom to receive after hours.*[13] A grocer is not obliged to stay at his place of business to receive express matter after the hours usual in mercantile business. Why should a banker have to be ready beyond the hours recognized as usual for the bank to be open and do business? Of course, if he *is* at the bank, and can receive the package without any further inconvenience than re-opening his safe, he should do so. The fair thing would seem to

[11] 3 Dana (Ky.) 91. [12] Merwin *v.* Butler, 17 Conn. 138.

[13] In Wisconsin the business hours of banking has reference to the general custom at the place of the particular transaction. Columbia Banking Company *v.* Bowen, 134 Wis. 218, 114 N. W. 451 (1908).

be, not that a bank must receive after the ordinary banking hours or lose all redress except for gross negligence of the carrier; nor that the carrier continues an insurer, but that, after the consignee knows of the arrival of the package, the carrier is held to ordinary diligence, no more nor less, that is, a warehouse liability, until the banking hours of the next day, when the bank can with convenience and safety receive the money.

§ 46. **Place.** — A bank has its legal home [1] in the State by which it is created, or, in case of a national bank, the State in which it is located or organized.[1a] Its domicil [2] is there and it is a citizen [3] of that State in reference to suing in any State or Federal court; it cannot transfer its franchises [3a] into any other sovereignty; "it exists by force of the law creating it, and where that ceases to operate it can have no existence." [4]

But such ordinary business [4a] *as its organic law gives it power to do, it may, by its agents, transact in any other State, unless prohibited by its charter, or by the laws* [4b] *or policy of such other State.*[5]

[1] § 46. The language of Waite, C. J., in *Ex parte* Schollenberger, 96 U. S. 369, 24 L. ed. 853.

[1a] Linton *v.* Childs, 105 Ga. 567, 32 S. E. 617 (1898); National Bank *v.* Golland, 14 Wash. 502, 45 Pac. 315 (1896).

[2] Adams *v.* Railroad, 6 H. & N. 404; Maclaren *v.* Stainton, 16 Beav. 279.

[3] See Green's Ultra Vires (1880), p. 4; Ducat *v.* Chicago, 48 Ill. 172; Fargo *v.* McVicker, 38 How. Pr. (N. Y.) 1. But in other respects than the right of bringing suits, a corporation has no status in States as a citizen of its creator.

[3a] A corporation cannot migrate beyond its own State. Runyan *v.* Lessee of Coster, 14 Pet. 122, 131, 10 L. ed. 382. The corporation itself cannot act validly beyond the territory of its sovereign, and the first meeting in New York of a Maine corporation is void. But the directors may act validly in another State, as where the directors of a Vermont corporation met in Massachusetts and granted mortgages, the action was valid. Arms *v.* Conant, 36 Vt. 745. See Galveston R. R. Co. *v.* Cowdrey, 11 Wall. 459, 20 L. ed. 199.

[4] Bank of Augusta *v.* Earle, 13 Pet. 519, 10 L. ed. 274.

[4a] A foreign corporation suing on a negotiable instrument is not doing business within the State under the New York banking laws. (Laws of 1892, Chap. 689, secs. 31, 32.) Citizens' State Bank *v.* Cowles, 89 App. Div. 281 (1903), 86 N. Y. S. 38.

[4b] Banking Corporations and those corporations which are within the contemplation of the banking laws of Michigan are not within the provisions of the statute prescribing the conditions on which foreign corporations may be admitted to do business in Michigan. New York Mortgage Co. *v.* Secretary of State, 150 Mich. 197, 114 N. W. 82 (1907).

[5] See on the general principle, Paul *v.* Virginia, 8 Wall. 168, 19 L. ed. 357; *Ex parte* Schollenberger, 96 U. S. 369; 24 L. ed. 853; Newburg Petroleum Co. *v.* Weare, 27 Ohio St. 343; Fawcett *v.* Mitchell etc. Co., 133 Ky. 361, 117 S. W. 956 (1909).

Agencies for specific purposes, as for the redemption of bills or the dealing in bills of exchange [6] may be established in other places. In these cases, it is for the convenience of the public that such should be the case.[7] But there is no case which holds that an agency for the exercise of the more important and valuable functions, such as issuing circulating paper or discounting notes, or an agency designed to carry on the general business of banking, would be regarded as legal. For such nominal establishment of agencies might easily result in the practical establishment of a network of branch banks [7a] throughout the home State or in other States.[7b]

States differ in their corporation laws; some restrict the capital; some make the stockholders individually liable; some require deposits with the State for the security of the public. Of course no State's comity will extend to allow the corporations of other states in which no such laws exist, to come and undermine such regulations. Such a State will say to foreign corporations, "If you wish to do business here, you must put yourselves under my laws."

Officers Doing Business away from the Bank

Some business, as receiving deposits, certifying [8] checks, and giving information of most kinds,[9] must be done at the *banking house*,[9a] or place set apart for those purposes by the bank, and cannot be done so as to bind the company by an officer away from the bank; * other business, as receiving information, and col-

[6] See (*a*), p. 115, and (*e*), p. 116.

[7] City Bank of Columbus *v.* Beach, 1 Blatchf. (C. C.) 425; Bank of Augusta *v.* Earle, 13 Pet. 519, 10 L. ed. 274; People *v.* Oakland County Bank, 1 Dougl. (Mich.) 282; Tombigbee R. R. Co. *v.* Kneeland, 4 How. 16, 11 L. ed. 855.

[7a] Banks cannot establish a branch bank in the absence of statutory authority. Bruner *v.* Citizens' Bank, 134 Ky. 283, 120 S. W. 345 (1909).

In Washington the statute allowing "branch banks" authorizes domestic banks to establish branches. State *v.* Engle, 50 Wash. 207, 96 Pac. 1045 (1908). See also same case for the meaning of "branch bank."

[7b] Quoted in Bruner *v.* Citizens' Bank, 134 Ky. 283, 120 S. W. 345 (1909).

[8] A bank can reject an acceptance of a cashier made away from the bank, if before his return anything happens that would make such acceptance improper, except as against a *bona fide* purchaser without notice. Bullard *v.* Randall, 1 Gray (Mass.) 605. See however (*f*), p. 120.

[9] Merchants' Bank *v.* Rudolf, 5 Neb. 527. See p. 121.

[9a] This may be a department store. Jones *v.* Cook, 174 Mo. 100, 73 S. W. 489 (1903).

*See § 168.

lecting debts, may be done by an officer away from the bank;[9b] the question is, "Does the proper performance of the business require any knowledge or appliances that can only be fully possessed at the office?"[10]

May Buy a Bill of Exchange in Another State

(*a*) The Chief Justice of the United States Supreme Court has said, "*Natural* persons through the intervention of agents are continually making contracts in countries in which they do not reside, and where they are not personally present when the contract is made; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an *artificial* person, by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside, provided such contracts are permitted to be made by it by the laws of the place? The corporation must no doubt show that the laws of its creation gave it authority to make such contracts, through such agents."[10c]

In this case, a Georgia bank having power to purchase bills of exchange had by its agent bought a bill in Alabama. The Circuit Court decided that a Georgia bank could not exercise its powers of discounting in another State, but the Supreme Court, in a powerful opinion, of which the above is a fragment, reversed the Circuit decision, holding that the comity of nations was administered by the courts of the various States, and acknowledged by them as a proper ground of judgment, and that when the organic law of the bank allows it to make such contract in another State, and such transaction is not contrary to the law, policy, or interests of such State, there is no reason for refusing to sustain the contract. This was done in this case, establishing a rule that has been followed in New York, Missouri, Massachusetts, Louisiana, and other States, and may be regarded as settled law.[10a]

[9b] Quoted in Bruner *v.* Citizens' Bank, 134 Ky. 283, 120 S. W. 345 (1909), which holds that a bank cannot establish branch banks unless specially authorized.

[10] See on this subject "Cashier", § 168.

[10c] Bank of Augusta *v.* Earle, 13 Pet. 60, 10 L. ed. 354.

[10a] A foreign banking corporation purchasing a note in the State, but having no purpose to do any other act in the State, is not "transacting business" in the State. Commercial Bank *v.* Sherman, 28 Or. 572, 45 Pac. 658 (1896); Bank of British Columbia *v.* Page, 6 Or. 431; Hacheny *v.* Leary, 12 Or. 40, 7 Pac. 329. The bringing of an action on a negotiable

(*b*) The corporation must show that the law of its creation gave it authority to make such contracts as those it seeks to enforce. Yet, as in case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence, as an artificial person, in the State of its creation, is acknowledged and recognized by the State or nation where the dealing takes place, and that it is permitted by the laws of that place to exercise the powers with which it is endowed.[11]

Holding Land in Other States

(*c*) In those States where there are no general statutes or settled policy restricting them in this respect, corporations of other States may purchase and hold lands *ad libitum*, provided their charters give them the competent power.[12]

Notes Issued in Another State

(*d*) In Virginia, it was decided that no recovery could be had upon notes there issued by a banking corporation of another State, through an agency established in Virginia, inasmuch as such banking operations were contrary to the policy of the statute against unincorporated banking companies; though it was admitted that notes, originally negotiated and indorsed in Virginia, and that contracts ancillary to banking operations, might legally be made there by such a corporation.[13]

Agency for Deposits in Another State

(*e*) Having an agency to receive deposits in another county than that of the bank's location, contrary to charter, is a cause

instrument is not "doing business" within the State. Citizens' State Bank *v.* Cowles, 89 App. Div. 281 (1903), 86 N. Y. S. 38.

[11] Commercial Bank of Vicksburg *v.* Slocomb, 14 Pet. 60, 10 L. ed. 354; Irvine *v.* Lowry, 14 Pet. 293, 10 L. ed. 462. And see Bank of Augusta *v.* Earle, 13 Pet. 584, 10 L. ed. 306; Ohio Railroad Co. *v.* Wheeler, 1 Black 286, 17 L. ed. 130.

[12] Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370; Lumbard *v.* Aldrich, 8 N. H. 34; Lathrop *v.* Commercial Bank of Scioto, 8 Dana (Ky.) 119; Bank of Washtenaw *v.* Montgomery, 2 Scam. (Ill.) 428, 2 Kent, Com. 284, 285; New York Dry Dock *v.* Hicks, 5 McLean, 111; Farmers' Loan Co. *v.* McKinney, 6 *id.*, 1. The burden is, however, upon the corporation or those claiming under it, to show that by its charter it is a body politic authorized to take or convey lands. Lumbard *v.* Aldrich, 8 N. H. 34.

[13] Bank of Marietta *v.* Pindall, 2 Rand. (Va.) 465.

of forfeiture, though an agency to redeem bills is not.[14] So it is unlawful for a national bank of New Jersey to have an agent to receive deposits in Philadelphia.[15]

A bank within the sphere of its action may bind itself to do any act *in any place*,[16] even if it is in another State.[16a]

National Bank's Locus

(*f*) The place named in the organization certificate fixes the locality of a national bank,[17] and its general business must be done there;[18] but this provision is to be construed reasonably. "The business of every bank away from its office — frequently large and important — is unavoidably done at the proper place by the cashier in person; or by correspondents or other agents." So, where a cashier bought gold and paid for it by certifying checks at the counter of another bank, it was held proper.[19]

A national bank in another State cannot have an officer of discount or deposit in New York.[20]

A national bank cannot make a valid contract for the cashing of checks upon it, at a different place from that of its residence, through the agency of another bank.[21]

But representations that a note is good, made by a cashier in another city, bind the bank.[22]

[14] People *v.* Oakland County Bank, 1 Doug. (Mich.) 282.

[15] National Bank of Camden *v.* Pierce, 18 Alb. Law J. 16.

[16] Bank of Utica *v.* Smedes, 3 Cow. (N. Y.), 684; McCall *v.* Byram Manufacturing Co., 6 Conn. 428.

[16a] Fawcett *v.* Mitchell, 133 Ky. 361, 117 S. W. 956 (1909).

[17] Cooke *v.* State National Bank, 52 N. Y. 96; National Bank *v.* Galland, 14 Wash. 502, 45 Pac. 315 (1896).

[18] Burton *v.* Burley, 12 Leg. News 178; s. c., 9 Rep. 301.

[19] Merchants' National Bank *v.* State National Bank, 10 Wall. 604, 19 L. ed. 1008.

[20] National Bank of Fair Haven *v.* The Phœnix Bank, 6 Hun (N.Y.) 71.

[21] Armstrong *v.* Second National Bank, 38 Fed. 883 (Ohio).

[22] Houghton *v.* First National Bank, 26 Wis. 663; Bissell *v.* First National Bank, 69 Pa. St. 415.

CHAPTER VI

BUSINESS POWERS[a]

§ 47. Business Powers, Express or Implied, Original and Incidental.
(*a*) History is a proper guide as to what constitutes banking business.
(*b*) Fundamentals, banks not created for traffic, but to receive deposits and lend money for the accommodation of the public and the profit of stockholders, and power to issue money is sometimes added.

§ 48. The Banking Powers.
(1) To receive deposits, special, specific, and general, and give security. §§ 171, 191.
(2) To loan money on real or personal security, etc. §§ 74–76, 75 *d*, 125, 128, 160, 173, 357, 753, 755, 761; II. §§ 35, 129.

§ 49. (3) To buy and sell exchange, coin, and bullion, to sell its property, deal in checks, and to purchase bills and notes. §§ 72, 73.

§ 50. (4) To discount negotiable paper and negotiate the same. §§ 72, 73; § 9, n. 9; §§ 117, 125, 134.

§ 51. (5) To give certificates of deposit, and a prohibition against issuing notes to circulate as money does not affect this power. §§ 296–309; II. § 78.

§ 52. (6) To act as agent in some financial dealings, collection, remission, etc. §§ 213, 264.

§ 53. (7) To issue bank notes, if the power is specially conferred. § 633.

Incidental Powers.

§ 54. Unless restricted, a bank may do any act to accomplish the ends of its creation that an individual could do for the same end.

§ 55. Holding real estate, general rule. § 12, n. 4; §§ 74–76, 169; II. §§ 28, 128.
Statutes of mortmain.
Devise.

§ 56. Making contracts. § 12, (5), (6), (7), n. 3, 4, 5, 9, 10, §§ 70, 144 *d*, *e*, *m*, 162, 169, 170, 722, 744.
Test of its power.
Modern tendency is to liberality.
A contract is presumed to be for a proper purpose. II. § 128.
Agreement to recover stolen deposit good.

§ 57. May settle claims.

[a] See Fed. Res. Act. Part II. § 104.

§ 58. May take goods on credit.
§ 59. May deal in government securities. National bank may not loan on its own stock. State bank may. Any bank can loan on other stocks, but not buy and sell them. §§ 77 *a*, 164; II. § 35.
§ 60. To save a debt, may even carry on temporarily a foreign business. §§ 77 *a*, *b*, 78.
§ 61. Surplus capital may be used in other business. § 66. Tax on. II. § 141, *p*, *t*.
§ 62. Alienation of Property. § 721.
Gift. § 65.
§ 63. May borrow on time when reasonably necessary in the conduct of the business of the bank, and *negotiable paper* or *mortgage security* may be given. §§ 116 *a*, 160 *a*, *b*.
§ 64. May draw checks, and indorse them, or any other paper properly coming to it. §§ 154, 158.
§ 65. A bank cannot lend its credit. It cannot be a guarantor or surety where it has no interest. It cannot indorse for accommodation, but may warrant goods, or guarantee or indorse negotiable paper. §§ 156, 158, 745 *a*, 748.
§ 66. Dividends, Surplus. §§ 128, 699 *c*, 708, 716, 717; II. §§ 33, 34, 35, 50 *c*, 112, 135.
§ 67. Abandonment of a part of its franchises.
§ 68. RESTRICTIONS ON THE POWERS OF A BANK.
§ 69. Express Restrictions as to
(*a*) Place. § 168.
(*b*) Time. § 168.
(*c*) Traffic.
(*d*–*l*), (*n*, *o*) Debts and Loans. §§ 128, 753, 755, 761; II. §§ 29, 35, 36, 129.
(*l*) and (*m*) Real Estate. § 12, n. 4, §§ 74–76, 169; II. §§ 28, 128.
(*n*, *o*) Interest. § 12, n. 15, §§ 309, 750; II. §§ 30, 130, 150 *c*.
(*p*–*u*) Circulation. § 633.
(*v*) Capital. §§ 14, 127; II. §§ 12–15, 37, 38, 81, 113.
§ 70. (*w*) Form of contract. §§ 12 (6), (7), 98 L, 144, 162, 169, 170, 722, 744.
§ 71. Common Law Restrictions.

§ 47. **What Business can a Bank do?** — The business powers of a bank are either *express or implied*, and are conveniently divided into (1st) Primary or Principal, or *Banking* Powers, for the exercise of which it is created, and (2nd) *Incidental* Powers, or such as are necessary or usual and convenient for the attainment of the purposes of its creation.

It is necessary to confer in distinct terms in the charter or act of incorporation only those powers which the company could not otherwise exercise, or those concerning which there might be some doubt. Various powers have been at different times declared by the courts to be inherent, and to be properly enjoyed

by banking associations simply by virtue of their creation and existence as such, and for the designated end of conducting the banking business. But powers of this nature, being based only upon a legal implication, must be used only in a manner and for purposes strictly consistent with such restrictions, and in furtherance of such duties as are specifically prescribed by law.

(*a*) In regard to matters not clear upon statute or binding decisions, it is a proper method of ascertaining what is legitimately within the scope of the business of banking, and what are the powers of corporations formed for the purpose of carrying on that business, to refer to the history of banking and the definitions of lexicographers.[1]

The powers of a bank, so far as established by statutes and decisions, will be of course judicially [2] noticed by the courts; and, as the business of bankers is part of the law merchant, courts judicially notice the universal custom of bankers.

(*b*) The heart of the law of banking is that a bank has such powers as are requisite for the safe and convenient attainment of the purposes of its incorporation, the chief of these being to *provide a place of safety* in which the public may keep *money and other valuables,* and to *lend* its *own money,*[3] and *that of others deposited with it* (unless specially deposited) *for a profit,*[4] and to act as agent in the remission and collection of money. If it is, by its organic law, a bank of issue, it has one more fundamental purpose, namely, to provide the public with a convenient currency in the shape of promissory notes intended to circulate as money.

[1] § 47. Pattison *v.* Syracuse National Bank, 80 N. Y. 94.

So the existence and nature of a corporate power may sometimes be even in this advanced state of the law a question of fact, though usually one of law.

[2] In England, it has been declared by Lord Campbell that the nature of the business of bankers is a part of the law merchant, and will be judicially noticed by the courts. Bank of Australasia *v.* Breillat, 6 Moore, P. C. 173. It is the same in the United States: men of business are presumed conclusively to know the system by which nearly all banks in the country transact monetary affairs, by checks, drafts, and certificates of deposit, and courts take judicial notice of such customs. British & American Mortgage Co. *v.* Tibballs, 63 Iowa 468, 19 N. W. 319.

[3] It is *money*, not its *credit*, that a bank is to lend. There is too much business done already on baseless credit to need to create corporations for the purpose. Johnston Bros. *v.* Charlottesville National Bank, 3 Hughes 657.

[4] A bank is to be conducted for the benefit of its stockholders, as well as for that of the public, and it cannot (unless every stockholder assents) give away its money, or the use of it.

It will be a great aid to a clear understanding of the cases to keep these foundation facts in view, especially in reading the decisions relating to usury. Every transaction of a bank that is really a parting with its money for a time is regarded as a loan so far as usury is concerned, and the bank will not be allowed to make more than lawful interest taken in advance, although an individual might make a greater profit by an exactly similar proceeding. It is not the purpose of banking to make a profit by trafficking, as a merchant does, but allowing the public to use the bank's funds for a fair return.

But a bank is entitled to receive indemnity for expense it incurs, as in the remission or collection of money, and may make a reasonable charge for labor and service, and if by the *express terms* of a contract the principal is hazarded, as in case of a bottomry loan, the bank may charge for this risk. These are none of them charges simply for the use or forbearance of money, and so are not within the usury laws.

The business of a bank is not "traffic", or buying and selling to gain by advance in the price received over that given, nor speculation of any kind, but receiving deposits and *lending money* for the accommodation of the public and the *profit* of the stockholders.[5]

This is the root from which grows most of the law of banking.

§ 48. **The Banking Powers** are those which are either fundamental parts of the business, or have become so linked with them as to be identified with the exercise of the banking franchises.[a]

The United States statutes constitute the measure of the authority of national banks,[b] and they cannot rightfully exercise any

[5] "The business of banking, as defined by law and custom, consists of the issuance of notes payable on demand intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, State and national and municipal and other corporations." Mercia *v.* Burget, 36 Ind. App. 453, 75 N. E. 1083 (1905), quoting from Mercantile Bank *v.* New York, 121 U. S. 138, 30 L. ed. 895, 7 Sup. Ct. 826. See also Earle *v.* American Sugar Refining Company, 74 N. J. Eq. 751, 71 Atl. 391 (1908); State *v.* People's National Bank, 75 N. H. 27, 70 Atl. 542 (1908).

[a] § 48. They include the power to borrow when necessary to meet pressing demands. Wyman *v.* Wallace, 201 U. S. 230, 50 L. ed. 738, 26 Sup. Ct. 495 (1905).

[b] National banks may act as county depository of school funds and may make arrangements with the State the same as with any other depositor. Charlton *v.* Cousins, 103 Tex. 116, 124 S. W. 422 (1910).

powers except those expressly granted, or which are incidental to carrying on the business for which they are established.[0a]

The same is true with regard to banks in Kentucky.[0b]

Deposits

1. A bank may receive special,[1] specific,[2] and general [3] deposits, and give security for them.[3a] See § 63.

[0a] California Bank *v.* Kennedy, 167 U. S. 362–366, 42 L. ed. 198, 17 Sup. Ct. 831 (1897); Logan Bank *v.* Townsend, 139 U. S. 67, 73, 35 L. ed. 107, 11 Sup. Ct. 496; Bailie *v.* Farmers' National Bank, 97 Ill. App. 66 (1901); Commercial National Bank *v.* First National Bank, 97 Tex. 536, 80 S. W. 601 (1904); Sturdevant Bros. *v.* Farmers' etc. Bank, 69 Neb. 220, 95 N. W. 819 (1903). See also Gause *v.* Commonwealth Trust Co., 196 N. Y. 134, 89 N. E. 476, 24 L. R. A. (N. S.) 967 (1909); State *v.* German Sav. Bank, 103 Md. 196, 63 Atl. 481 (1906); Arkansas Valley etc. R. Co. *v.* Farmers' etc. Bank, 21 Okla. 322, 96 Pac. 765, 129 Am. St. Rep. 782 (1908); McBoyle *v.* Union National Bank, 162 Cal. 277, 122 Pac. 458 (1911); Merchants' National Bank *v.* Wehrmann, 69 Ohio St. 160, 68 N. E. 1004 (1903).

They do not authorize national banks to act as a broker in lending the money of others, Bryon *v.* First National Bank, 75 Or. 296, 146 Pac. 516 (1915), or to buy drafts without bills of lading attached, First National Bank *v.* First National Bank, 247 Pa. St. 40, 92 Atl. 1076 (1915).

But it may exercise such incidental powers, and so it may contract with the State to pay the tax which is due the State from its depositors. State *v.* Clement National Bank, 84 Vt. 167, 78 Atl. 944, 1912D Ann. Cas. 22, n.

[0b] The statute should be construed strictly for the benefit of stockholders and protection of depositors, and so the attempt to secure the payment of a depositor by pledging the assets of the bank is *ultra vires* and void. Commercial Banking etc. Co. *v.* Citizens' Trust etc. Co., 153 Ky. 566, 156 S. W. 160, 1915C Ann. Cas. 409, n., 45 L. R. A. (N. S.) 950 n.

[1] In Whitney *v.* First National Bank of Brattleboro, 50 Vt. 388, the court held that a national bank had no power to receive special deposits *without profit*, and if it did it was not responsible for their safe keeping, even though received with the acquiescence of directors. The officer receiving is the depositor, not the bank.

In First National Bank *v.* Ocean National Bank, 60 N. Y. 279, the court questioned the power of national banks to receive special deposits, but if the directors sanctioned the receipt of them the bank would be bound. This was one degree above the zero of logic in the Vermont case, and in National Bank *v.* Graham, 79 Pa. St. 106, the court (disagreeing expressly with 50 Vt.) held that the directors could authorize or sanction the receipt of special deposits as being a part of the immemorial usage of banking, — indeed it was the root from which grew the whole business.

Conclusive Decision. And now the question is set at rest by the Supreme Court of the United States in First National Bank of Carlisle *v.* Graham, 100 U. S. 699, 25 L. ed. 750, where it is held that a National Bank *may* receive special deposits gratuitously. § 8 of the National Banking Act gives power to carry on the business of banking by "receiving deposits"; and special deposits are as truly deposits as any other, and as truly a part

Loan

2. Subject to the usury laws [4] and charter restrictions [5] (if any) a bank may loan [5a] money on security,[6] real [6a] or personal,[6b] or

of banking business as it is written down in the history and usage of the commercial centuries.

R. S. § 5228. Besides, the R. S. § 5228 speaks expressly of the *return of "special deposits"* in case of dissolution, and it is difficult to imagine why they should be returned if never received. The construction put on this by the State courts, that it referred only to money deposited for payment of notes or other specific deposits, is entirely untenable; both "deposits" and "special deposits", clearly include gratuitous bailments for safe keeping, and the courts have no right to cut them down or amputate a part of the rights Congress has given to national banks.

[2] See § 206. The authority to receive specific and general deposits is universally admitted. American National Bank *v.* Presnall, 48 Pac. 556 (1897).

[3] See § 288.

[3a] An indemnity bond given to induce the deposit of public funds of the county in a certain bank is not void as against public policy and may be enforced. Weddington *v.* Jones, 41 Tex. Civ. App. 463, 91 S. W. 818 (1906). The bond is a continuing obligation as long as the public funds are placed in the bank, and a surety is liable thereon unless he has terminated his obligation by proper notice. Snattinger *v.* Topeka, 80 Kan. 341, 102 Pac. 508 (1909).

[4] A bank must not in any transaction gain more than lawful interest for the time it is out of its money.

A clause in the charter of a bank authorizing it to lend money on such terms and rates as might be agreed upon, has been held not to convey authority to charge a rate higher than that allowed by the general law of the State regulating interest. Simonton *v.* Lanier, 71 N. C. 498; Seneca Co. Bank *v.* Lamb, 26 Barb. (N. Y.) 595. The discount charged in buying notes should not exceed the rate of interest allowed by law in case of a loan. Salmon Falls Bank *v.* Leyser, 116 Mo. 551, 22 S. W. 504.

[5] A Massachusetts State bank must not have debts due in at any time to a greater amount than double the capital paid in (not including debts due from another bank, or from the State or the United States). R. L. c. 115, §§ 33, 34.

Either the capital, or the capital and deposits, of the corporation, according to the regulations prescribed in the charter, may serve as the basis upon which loans and discounts may be made. Special deposits can never serve as such basis, or be included as a part of it. Even where the statutory phrase is "the moneys actually deposited for safe-keeping", it will be construed to mean only general deposits, and not to include any description of such as are in fact special. Foster *v.* Essex Bank, 17 Mass. 479.

[5a] Cottondale State Bank *v.* Oscamp Nolting Co., 64 Fla. 36, 59 So. 566 (1912).

[6] A Massachusetts bank cannot make a loan in any other way than on demand. It must be payable at once, or it is void. R. L. c. 115, § 51.

In Pennsylvania an act of incorporation allowed a corporation to hold lands "mortgaged or conveyed to it in satisfaction of debts previously contracted." It was held that a conveyance in trust, or any conveyance

without other security than the right of action against the borrower,[6c] as in the case of overdrafts by agreement with the directors, but this is looked on with disfavor by the courts.

A national bank cannot take real estate [7] security by a conveyance to *itself* at the time of the loan, or for future loans, but only for debts previously contracted, although if it *does* take concurrent security by trust deed, mortgage, etc., only the United States can object,[7] and the bank can successfully sustain a suit for foreclosure unless its sovereign interferes, though it exceeded its powers and violated the supreme law of the land in taking the mortgage.[7]

A law enacted for the benefit of banks and their depositors cannot be set up as a defence by a borrower from the bank.[7]

that would put the corporation in possession, would violate the law; it could not take the title to the land, legal or equitable, except for previous debts. But any conveyance merely with a view to raising money by sale of the land, and not to give the corporation the ownership, was good. Baird *v.* Bank of Washington, 11 S. & R. (Pa.) 411. But see Chautauque Bank *v.* Risley, 19 N. Y. 369.

A bank may loan money to residents or non-residents and take notes or other security, whether it be for the purpose of discount or to secure a debt. Fawcett *v.* Mitchell etc. Co., 133 Ky. 361, 117 S. W. 956 (1909).

Stock Security. A national bank cannot loan on its *own* stock. Part II. § 35. But a Massachusetts bank may to the extent of one half the paid capital. R. L. c. 115, § 31.

A national bank may take and hold a chattel mortgage to secure an antecedent debt. First National Bank of Skowhegan *v.* Maxfield, 83 Me. 576, 22 Atl. 379.

[6a] See § 74 *et seq.*

[6b] The bank may sell such property and apply the proceeds thereof to its debt; or, with the consent of the mortgagor, it may sell the collateral at private sale and guarantee the title, quality, soundness or healthful condition of such security and it is liable on such guarantee as a natural person would be. State Bank *v.* Dody, 71 Kan. 98, 79 Pac. 1092. (1905.)

[6c] When a bank loans money to a treasurer of a town to pay town orders upon his agreement to deposit with the bank accepted town orders, the bank is entitled to the town orders that are found among the private papers of the town treasurer at his death, covering the amount that he had overdrawn. New Haven *v.* Weston, 87 Vt. 7, 86 Atl. 996, 46 L. R. A. (N. S.) 921, n. (1912).

[7] Savings Bank *v.* Burns, 104 Cal. 473, 38 Pac. 102; Lexington *v.* Union National Bank, 22 So. 291 (1897); Bank *v.* Flathers, 45 La. Ann. 75, 12 So. 243; National Bank *v.* Whitney, 103 U. S. 99, 26 L. ed. 443; Fortier *v.* National Bank, 112 U. S. 439, 28 L. ed. 764, 5 Sup. Ct. 234; Hennessy *v.* St. Paul, 54 Minn. 219, 223, 55 N. W. 1123; Bank *v.* Trexler, 174 Pa. St. 497, 34 Atl. 195; Fifth National Bank *v.* Pierce, 117 Mich. 376, 75 N. W. 1058 (1898). See Part II. § 28. National Bank *v.* Matthews, 98 U. S. 625, 25 L. ed. 188; Schuyler National Bank *v.* Gadsden, 191 U. S. 451, 48 L. ed. 258, 24 Sup. Ct. 129 (1903). See § 74, note 7[a].

The practical workings of this apparently so unjust rule are about the same as if the rational law were put in its place, as we shall see when we come to speak of *Ultra vires.*[8]

Purchase, Sale or Discount of Negotiable Paper

§ 49. 3. A bank may buy [1] and sell exchange,[2] coin, and bullion, and unless restricted [3] it can *sell* [3] any negotiable paper or other

[8] See § 722.

[1] § 49. See this expanded, §§ 72–74.

The powers treated here are usually expressly granted, though they are so identified with the business, as methods of carrying out its fundamental purposes, that they are inherent.

[2] Suppose N. in New York owes P. in Paris, it is expensive to send coin across the water. So N. finds Y. in New York, who is a creditor of S. in Paris, and N. pays Y. money here, taking from Y. an order directed to S. to pay N. or order the debt S. owes Y. N. orders payment to P. or order, and sends the bill to P. So two debts are paid without transfer of coin. Now, if there are more debtors in New York of Paris creditors than there are creditors of Paris debtors, bills on Paris will be in demand, and N. will have to pay a little more than the actual coin with which he could pay his debt if he had it in Paris. This is called a *premium*, and will never be more, of course, than the cost including risk of sending the coin. But if there are more creditors than debtors in New York, the creditors will compete, and to save the expense and trouble of collecting their foreign debts will take a little less than an actual equivalent. This is called a *discount.*

This premium and discount are both called exchange, and the rate of exchange is the amount of premium it will cost to replace a sum of money in one country by an equal sum in another, or it is the difference in value of the same amount of money in the two countries by reason of their distance.

Now the power of a bank to "buy exchange" (see Part II. § 8) means simply the right to buy bills of exchange at the current rate of discount or premium, and does not give power to buy bills at any agreed price, as an individual may. It is the "*exchange*" that is to be bought or sold, not the bill itself, except in that partial meaning of the word purchase, to acquire title.

See Fed. Res. Act. Part II. § 154.

[3] A national bank cannot sell bills of exchange payable in another place for *more* than the rate of exchange on sight drafts plus lawful interest (see Part II. § 30), and no overcharge for service, risk, or exchange by any bank will be sustained. Merchants' Bank *v.* Sassee, 33 Mo. 350; Bank of United States *v.* Davis, 2 Hill (N. Y.) 451. Bills payable in the same place will not be apt to sell for more than their value: men will not give $100 cash for $50 in the same place, and there seems to be no reason why banks should not have the power to sell negotiable paper they may hold for as much *less* than its face as the parties may agree, just as individuals may; but the distinctions as to what are sales and what are loans must be carefully attended to. (See text following this reference.)

Unconstitutional Restriction. A State declaring "it shall not be lawful for any bank to transfer any note, or other evidence of debt", is uncon-

property to which it has properly acquired a title; but whether it can *purchase*[3a] *negotiable paper* is one of those questions that has got tangled up in the double meanings of words, as well as having inherent difficulties, and has been much litigated.

Purchase is used in two senses: 1st, simply to indicate acquirement of title by any means other than descent; 2d, to indicate that sort of transaction which among individuals is not subject to the control of usury laws.

If this distinction is kept in mind the cases on this subject become clear.

(*a*) If A. gives B. money, and B. gives A. his note for the debt, this is a loan, not a purchase in the second sense, and must not violate the usury statutes.

(*b*) If A. transfers B.'s note to C. by indorsement generally, so that A. becomes bound on the note, there is great conflict of opinion whether it is to be considered a sale or a loan as to usury. The best opinion is, that, as the statutes against usury apply only to loan or forbearance of money, and as they are to be construed strictly,[4] such a transfer (unless a mere cloak for usury[5]), not involving any primary liability of A., is not a loan, but differs therefrom in the fact that C. cannot claim the money unconditionally of A., but must with due diligence pursue B., and the risk and expense involved in this is an important consideration additional to what occurs in case of a loan, and may well be taken into account in the price of transfer.[6]

stitutional, as to banks already in possession of such power. Planters' Bank *v.* Sharp, 6 How. 301, 12 L. ed. 447.

[3a] See Fed. Res. Act. Part II. § 154.

[4] They are relics of barbarous ages, when men did not know that the use of money was as valuable a consideration as the use of land, and they are to-day mere weapons with which revenge and bad faith may bruise the friend who has aided them. Men make no greater charge than the laws of nature proclaim the money is worth, and that will continue to be charged and obtained, though the legislature devote themselves exclusively to preventing it. A usury law is a blot upon the statute-books of any State.

[5] As it would be if B. gave his note to A. for the accommodation of the latter, receiving no value, and C., *knowing this fact*, bought at greater discount than allowed by law on loans, for in effect this is lending money on B.'s promise to pay a sum so much greater as to make it usurious. A. is not a real party in the matter. Whitworth *v.* Adams, 5 Rand. (Va.) 333.

[6] *Usury.* National Bank of Michigan *v.* Green, 33 Iowa 141 (1871); State Bank *v.* Coquillard, 6 Ind. 232. Binghamton Trust Co. *v.* Clark, 32 App. Div. (Hun, N. Y.) 151 (1898). This is the opinion of Prof. Parsons, 2 Notes & Bills 429 (see also 2 Contracts, 425), and of Daniel, Neg. Inst. 623. And so far as it narrows usury, it is the best opinion; the fact is,

The same applies to the transaction between the drawer and payee of a bill of exchange: the drawer is only secondarily liable.

however, that all distinctions on usury are irrational. If it did not make such terrible confusion and useless litigation, it would be ludicrous to see how the judges flounder about, and put down all sorts of inconsistencies in the reports, trying to determine what constitutes the sin of usury.

A bank lends A. money, and takes B.'s note for it indorsed by A. This is just the same as if A. kept B.'s note and gave the bank his own for the same time, except that the bank instead of A. now has the trouble and expense of collecting from B.

If A. indorses without recourse, still (supposing B. to be as good as A. and as near) as to the bank the transaction is exactly the same as if it took A.'s note; the bank has parted with so much money for a time certain, on the promise of some one to pay it.

Now if the object of usury laws is to prevent the owner of money from making more than a certain per cent (say six), by foregoing possession of it, then all sales and indorsements by which the person who pays the money will reap a return of more than six per cent are usurious.

If, however, the purpose of usury laws is to prevent oppression of the one to whom the money is paid, then, as it cannot be oppression to take for a thing what it is really worth to him and to others (and any law which compels one to take less for the use of his property, or for giving up his rights, than they are fairly worth, is unjust, as it takes away property from one and gives it to another without a full equivalent), it follows that, if six per cent is proper for A. to pay for the use of the money when he gives his own note, it is proper, and not oppressive for him, to pay a little more than he indorses over B.'s note, instead of giving his own and keeping B.'s, for he thereby is relieved of the trouble and expense of collecting B.'s note; and when he indorses without recourse, he may properly pay a little more yet, for the risk of B.'s insolvency is removed from him; and, carrying out the analysis, if he can, by using the money, draw from the bosom of the earth twenty or forty per cent return more than he could without it, why is it oppression to ask him twelve or fifteen per cent?

What gentle oppression it is to ask one half of the gain my money has enabled him to realize, and which I might myself have obtained! No, the oppression is in taking away the liberty of contract, and saying to me, "No matter how great return your money may bring, nor what the variations in risk, you can never take more than six per cent."

The fact is, that the use of power, whether it be in the shape of money, lands, or goods, ought to be paid for at its fair value, which varies with the circumstances of every case.

Usury laws are built on no firmer foundation than fog, and in the light of analysis vanish like the meadow mists in the morning sun. All that is necessary for protection against extortion is the rule that applies to all contracts, namely, that gross inadequacy of consideration is evidence of fraud. Conscienceless advantage must not be taken, nor in case of a *bona fide* contract should improvidence or weak-mindedness (except of children and married women) be protected or kept from exterminating itself. The common law and equity are adequate, and the real effect of usury laws is to make honest men pay more for their money than they ought, in order to cover losses that may occur through advantage being taken of the usury statutes by raseality.

But in other States such a transfer by indorsement is held to be usurious; some allowing the holder to recover against all parties but the indorser;[7] others hold that the transfer is void, gives no title, and no recovery is possible.[8]

(*c*) If A. transfers B.'s paper to C. by delivery (if it is payable to bearer), or by indorsement without recourse, this (unless merely a cover for usury) is a sale, and may be for any price on which the parties agree.[9]

Now the question is, Can a bank purchase negotiable paper as a private individual may?[9°]

First, it is clear that a bank may purchase in the sense of acquiring title;[9a] if a note is deposited, credited as cash, and drawn against, the bank is a holder for value; discounting even in its most limited sense, that of mere lending, gives title, and buying exchange involves the purchase of bills of exchange. See Part II. § 30.

Second, a bank *may* have power to purchase at any agreed price, according to the terms of its organic law; but it may be laid down as an almost, if not quite, universal principle, that all transfers of negotiable paper to a bank are subject to usury laws, and that it has no right to take paper at a greater reduction.

Third, if a bank *does* take at a greater discount, then in case of

[7] Collier *v.* Nevill, 3 Dev. (N. C.) 31. No intermediate illegality can affect the liability of maker or acceptor. Armstrong *v.* Gibson, 31 Wis. 61.

[8] Whitworth *v.* Adams, 5 Rand. (Va.) 419.

[9] Nicholes *v.* Fearson, 7 Pet. 109, 8 L. ed. 624.

[9°] A bank may buy negotiable paper in the sense of acquiring absolute title to it, but is not free as to price, as an individual is.

If a national bank passes money to A. and takes A.'s own note, or the note of B. indorsed by A., either generally or without recourse, the bank must not gain more than what would be lawful interest for money in any case. II. § 30.

But if it does buy or loan so as to gain more, its title to the paper is not affected.

No one can deny its title but the United States.

A State bank, and under New York law, a trust company, *may* by its organic laws be able to purchase as an individual can.

But as it is no part of Banking business to "traffic" in merchandise or financial securities, and as the fundamental fact in each of the three methods of acquiring paper is the same as regards the bank, the tendency is to hold the bank up to the usury standard in all transactions.

If it transgresses, most States hold its title as to prior parties good. See cases *supra*.

[9a] Taft *v.* Quinsigamond National Bank, 172 Mass. 363, 52 N. E. 387 (1899); Salmon Falls Bank *v.* Leyser, 116 Mo. 51, 22 S. W. 504; Kansas National Bank *v.* Quinton, 18 Pac. 20 (1897).

a State bank the consequence may be that it cannot recover on the paper, the transaction being held void, or it may be able to recover as to all prior parties, and only liable to the immediate transferrer. In the case of a national bank, the best opinion is, that a transfer in either of the ways *a*, *b*, *c*, above, may be made; and, if usurious, the penalty prescribed by the National Banking Act is the only consequence; the bank's title is not affected, and prior parties may be held.[9b]

But in Maryland and Minnesota it has been held that "discounting" does not include any transaction but a loan; therefore a national bank has no power to acquire title by transfer without recourse, or in any way in which the transferrer is not responsible, and that such transfer, being *ultra vires*, gives no title, and the bank cannot recover on the paper. These are, however, in both branches reasonless decisions, and as to the latter point Minnesota has altered her mind, and in Maryland the dissent was much stronger than the opinion, and the later decision, in 57 Md. 128, is inconsistent with the Lazear case. (See *Ultra vires*, § 722.)

The word discount, by the usage of the commercial world and the common voice of all the dictionaries, means simply to buy at a reduction, and a loan is only one species of discount. It needs only to look at the National Banking Act to see that Congress used the word in its broad sense. If it means only loan, then it is useless in the eighth section; for the clause giving power to loan money on personal security covers it. The thirtieth section provides a penalty for any usurious transaction; but it has been repeatedly held that transactions in violation of this section are not void, and the defect can be taken advantage [10] of in no other way than the one there provided. And even though the act did not give power to take by absolute transfer, the weight of authority and reason is that recovery can nevertheless be had on the paper.

See for the expansion of this matter, § 48; and for the last point, see *Ultra vires*, § 722. See also § 61.

[9b] Nicholson *v.* National Bank, 92 Ky. 257, 17 S. W. 627 (1891); Prescott National Bank *v.* Butler, 157 Mass. 548, 32 N. E. 909 (1893).

[10] Oates *v.* First National Bank of Montgomery, 100 U. S. 239, 25 L. ed. 580; National Exchange Bank *v.* Moore, 2 Bond 170; Prescott National Bank *v.* Butler, 57 Mass. 548, 32 N. E. 999 (1893). See Usury, Part II. § 134.

Discount. Negotiate

§ 50. 4. A bank may discount (*i.e.* deduct from the face of the debt the amount of lawful interest on its face from the time of taking by the bank till maturity) and negotiate (*i.e.* "transfer, sell, pass", sometimes further meaning "procure by arrangement with another, settle by, and arrange for") bills of exchange, notes, and other evidences of debt.[0] These are inherent powers identified with banking as necessary and convenient methods of carrying out its fundamental purpose of lending money. Discounting[0a] is a part of the general business of banking, and could be done even without specific authority conferred in the incorporating act.[1] The holding back of interest in advance is implied in the phrase itself; it is a part of the definition of the word. But the bank, though it can thus secure a slight increase in the actual amount of money which it receives in payment for the *use of its funds*, can do it in no other shape and to no greater extent than precisely this.[2] Though if the *principal is risked expressly* (*i.e.* its payment made to depend on a contingent event), the bank can charge extra for this risk.[2]

[0] § 50. See Borrowing, § 63. See Fed. Res. Act. Part II. § 151.

[0a] Discounting includes acquisition by way of purchase or loan. Morris *v.* Third National Bank, 142 Fed. 25 (1905). See Seendahl *v.* First State Bank, 155 N. W. 794, N. D. (1916).

[1] Fleckner *v.* Bank of United States, 8 Wheat. 338, 5 L. ed. 631. See Citizens' Bank etc. Co. *v.* Thornton, 174 Fed. 752 (1909); Mine etc. Supply Co. *v.* Stockgrowers' Bank, 173 Fed. 859 (1909). But it is not exclusively a banking operation. Chase etc. Co. *v.* National Trust etc. Co., 215 Fed. 633 (1914).

[2] It may take not one particle more than the legal rate of interest, but it may discount, that is to say, "count off", and keep this out of its payment at the time when it hands over the balance of the loan to the borrower. This is the meaning and the only meaning of the words "upon banking principles", or "according to banking principles and usages", sometimes appended to the word "discount" in charters and organic laws. The addition signifies nothing more than the word "discount" would alone imply, and is in fact mere surplusage. M'Lean *v.* Lafayette Bank, 3 McLean 587; Creed *v.* Commercial Bank, 11 Ohio 489. No court will support the reservation of more than the legal rate of interest, upon the ground that this excessive rate is customarily reserved by all the banks in the neighborhood. Niagara County Bank *v.* Baker, 15 Ohio St. 68; New York Firemen's Ins. Co. *v.* Ely, 2 Cow. (N. Y.) 678, 707; Dunham *v.* Gould, 16 Johns. (N. Y.) 367.

Contingency. Custom cannot vary statute. At least no baby custom. An old, full-grown custom may, like that of discount itself, which is a real, substantial inroad on the usury law, and only sanctioned because the common sense of the judges is superior to their respect for the statute;

Certificate of Deposit

§ 51. 5. As involved in the power to receive deposits, a bank may issue certificates of deposits, which in Massachusetts [1] and Pennsylvania [2] are not regarded as negotiable paper; but in other States [3] they are considered promissory notes (which seems clear upon any definition [4] of a note to be found in the authorities), negotiable under the same limitations [5] as notes.

They are used to save carrying money; but as they do not pass by delivery, but only by indorsement, they are not intended to circulate as money in the sense of a banking law, such as the National or New York law, and therefore the prohibition in those acts of issuing *notes to circulate as money* other than those provided for or named in said acts, does not interfere with the power of a bank to issue certificates of deposit.[6]

as is shown again in cases where repayment is made expressly to depend on contingent events, as loans on bottomry and respondentia. Thorndike *v.* Stone, 11 Pick. (Mass.) 183.

[1] § 51. Shute *v.* Pacific National Bank, 136 Mass. 487, Coburn, J.

[2] Gillespie *v.* Mather, 10 Pa. St. 28; Patterson *v.* Poindexter, 6 Watts & S. (Pa.) 227.

[3] Minnesota, Michigan, North Carolina, Iowa, Georgia, Vermont, Connecticut, Illinois, Wisconsin, Indiana, Alabama, and California. The United States Supreme Court also held a certificate of deposit, "payable to order upon return of this certificate", to be negotiable. Miller *v.* Austen, 13 How. 218, 14 L. ed. 119. See § 296.

[4] A promissory note "is an open promise in writing by one person to pay another therein named, or to his order, or to bearer, a specified sum of money, absolutely and at all events." Daniel, Neg. Inst., § 28.

[5] Of course, if it is payable in "current funds", or anything else than money, it may not generally be held negotiable (otherwise in Indiana and New York). The words "value received" are necessary in Missouri. International Bank *v.* German Bank, 3 Mo. App. 367. If there are no words of promise, it is a simple receipt.

The words "on return of this certificate" do not affect the contract as to negotiability; it creates no further condition than is attached to an ordinary note, except *perhaps* the statute of limitations does not run until demand made. See § 296.

[6] Miller *v.* Austen, 13 How. 218, 14 L. ed. 119; Pelham *v.* Adams, 17 Barb. (N. Y.) 384.

"A certificate, issued by a national bank, stating that a person named has deposited in the bank a certain sum, payable to the order of himself on the return of the certificate properly indorsed, and understood between the bank and the depositor not to be payable until a future day agreed upon, is not in violation of the United States Rev. Stats. § 5183, forbidding national banks to issue any other notes to circulate as money than such as are authorized by its provisions.

"If the United States Revised Statutes forbade the issue of any other notes whatever than such as were therein authorized, it would be difficult to hold this certificate to be legal. Miller *v.* Austen, 13 How. 218,

They may be payable on demand, or on time, if the circumstances justify the bank in borrowing on time (see § 63), unless there is a restriction [7] in the organic law or by statute. If a bank cannot issue its negotiable promissory note on time, neither can it issue a negotiable certificate of deposit of this description. If the note would be void, so likewise is the certificate. If, however, the bank is empowered to issue promissory notes, subject only to the restriction that it shall issue none which are designed to pass into circulation as currency, but only such as become necessary in the ordinary course and conduct of its affairs, and are strictly business paper, then it may issue certificates of deposit, whether payable on demand or otherwise, subject only to the same restriction. By reason of the ease with which such instruments may be used for circulation, the courts have often been rigid in scrutinizing them, and applying the strict letter of the law to them; but they have never, that we have found, substantially modified or departed from the general principles above laid down.[8]

14 L. ed. 119. But assuming that it might fall within the general designation of a note, it cannot be considered as a note intended to circulate as money, within the meaning of the statute. It requires to be indorsed. It was understood not to be payable till a certain future date. It is not in a sum adapted for general circulation as money. The form of the instrument, and the incidents above mentioned, show that it was not intended to circulate as money between individuals, and between government and individuals for the ordinary purposes of society. Craig *v.* Missouri, 4 Pet. 410, 432, 7 L. ed. 903; Briscoe *v.* Kentucky Bank, 11 Pet. 257, 314, 318, 9 L. ed. 709; Virginia Coupon Cases, 114 U. S. 269, 284, 29 L. ed. 185, 191, 5 Sup. Ct. 903. See also Merchants' Bank *v.* State Bank, 10 Wall. 604, 648, 19 L. ed. 1008, 1019, where it was held that certified checks do not fall within a similar prohibition." Hunt, appellant, 141 Mass. 515, 6 N. E. 554.

[7] By Mass. R. L. c. 115, § 40, no promise to pay money at a future day certain can be issued by a bank, except for money borrowed of the State or a Massachusetts savings bank, or for money deposited by an assignee of insolvency. Under a statute against the circulation of bills and notes not payable on demand, a bank has no power to issue time certificates of deposit, and if it does they are void.

[8] Curtis *v.* Leavitt, 15 N. Y. 19; Leavitt *v.* Palmer, 3 Comst. (N. Y.) 19; Barnes *v.* Ontario Bank, 19 N. Y. 152; Bank of Orleans *v.* Merrill, 2 Hill (N. Y.) 295; Southern Loan Co. *v.* Morris, 2 Barr (Pa. St.) 175; Craig *v.* State of Missouri, 4 Pet. 433, 7 L. ed. 911; Kilgore *v.* Bulkley, 14 Conn. 362; Laughlin *v.* Marshall, 19 Ill. 390; Bank of Peru *v.* Farnsworth, 18 *id.*, 563; Lindsey *v.* McClelland, 18 Wis. 481; White *v.* Franklin Bank, 22 Pick. (Mass.) 181; Bank of Chillicothe *v.* Dodge, 8 Barb. (N. Y.) 233; Bank Commissioners *v.* St. Lawrence Bank, 3 Seld. (N. Y.) 513; Cate *v.* Patterson, 25 Mich. 191; Pardee *v.* Fish, 60 N. Y. 265; Miller *v.* Austen, 13 How. 218, 14 L. ed. 119; Poorman *v.* Mills, 35 Cal. 118, and other California cases therein cited.

Bank as Agent

§ 52. 6. A bank may act as agent in some financial dealings, as receiving money to pay notes,[1] engaging to remit [1] or collect money,[1] and procuring and exchanging government securities.[2] The bank can charge for these services; but in these dealings, as in others, the courts will see that a bank does not, under cover of a charge of service, obtain more than lawful interest for the use of its money.

If a bank undertakes to remit to, or to collect in, a distant place, it has a right to charge a reasonable sum to cover the rate of exchange, and the labor and risk to which it may be put.[3] Such a

[1] § 52. See Specific Deposit, § 206. Collecting is part of the banking business. Tyson *v.* State Bank, 6 Blackf. (Ind.) 225; Paint Co. *v.* National Bank, 4 Utah 353, 9 Pac. 709 (1886); Taft *v.* Quinsigamond National Bank, 172 Mass. 363, 52 N. E. 387 (1899); Keyes *v.* Bank, 52 Mo. App. 323; King *v.* Miller, 53 Or. 53, 97 Pac. 542 (1908); Knapp *v.* Saunders, 15 S. D. 464, 90 N. W. 137 (1902) (collection of rents due and payable under the terms of a lease). If the cashier of the bank acted for the bank in the collection of a draft drawn against grain shipped by the defendant and the bank received the benefit of the transaction it would be under a legal duty to account to the defendant even though the cashier exceeded his authority in assuming, on behalf of the bank, to act as agent for defendant in the transaction. First National Bank *v.* Bakken, 17 N. D. 224, 116 N. W. 92 (1908).

If a deed is left with a bank to be delivered upon the payment of a certain sum the bank is liable for delivering the deed upon payment of a less sum. Porter *v.* Packers' National Bank, 95 Neb. 223, 145 N. W. 255 (1914).

[2] A national bank can deal in and exchange government securities. Van Leuven *v.* First National Bank, 54 N. Y. 671. Buying United States bonds is highly meritorious, as they are intended to enable the government to raise money, and banks have so long acted as agents of the United States Treasury in the business of investing their own as well as customers' money in government bonds, without objection from directors or stockholders, and with the sanction of the general government, that it would be unjust now for the courts to hold the business *ultra vires*. Caldwell *v.* National Mohawk Valley Bank, 64 Barb. (N. Y.) 333.

Misapplication of Funds. The owner of real estate on which an elevator was being constructed borrowed money from a loan association and secured its payment by mortgage. The money was to be paid for the machinery in order that the mortgage might not be subject to a mechanic's lien. The money was sent to a bank with directions to pay a certain claim for machinery. The bank applied the money in payment of a debt owing it by the contractor. A lien on the elevator was afterwards foreclosed by the company furnishing the machinery. Held that the mortgagee may recover from the bank that misapplied the remittance without showing that the plaintiff paid the claim for machinery or foreclosed the mortgage. Winfield National Bank *v.* Railroad etc. Saving Asso., 71 Kan. 584, 81 Pac. 202 (1905).

[3] Merchants' Bank *v.* Sassee, 33 Mo. 350.

charge, though in the form of a percentage, is not interest, and is not usurious. But it must be made *bona fide.* If the charge for labor or risk is excessive, or if charges are made for exchange when the bank is not really obliged to pay anything on this account, or if credit is not given for exchange where nevertheless the bank actually receives something on account of it, then the form of the charge will be regarded as only colorable, and it will be considered that usurious interest has been taken or reserved.[4]

Issuing Bank Notes

§ 53. 7. A bank has no inherent authority to issue[0] bills[1] or notes designed to circulate as money. It is unlike those powers previously considered in this section; the right must be expressly given. See Part II. §§ 8, 21.

Such notes *must* be negotiable by mere delivery, payable immediately on demand, in business hours, at any time after issue, and without interest.

A bank has no authority express, incidental or implied to enter into a contract of partnership or for the building of levees.[2]

§ 54. **Incidental Powers of Banks** are such as are necessary or convenient in the conduct of the business set forth above, but not themselves so continuously or peculiarly essential to the attainment of the fundamental objects of the corporation as to be considered a part of the business of banking.[0]

General Principle

It is a general principle[0a] that, for the purpose of accomplishing the objects of its creation, a corporation may act and deal in the

[4] Bank of the United States *v.* Davis, 2 Hill (N. Y.) 451.

[0] § 53. The word "issue" has a "restricted, special and almost technical meaning, relating exclusively to the monied currency of the country." Lusk *v.* Stoughton State Bank, 135 Wis. 311, 115 N. W. 813 (1908).

[1] See chapter on Bank Bills, § 633, and see Part II. § 21, and R. L. c. 115, § 40, as to bank notes of a State bank.

[2] Interstate Trust etc. Co. *v.* Reynolds, 127 La. 193, 53 So. 520 (1910).

[0] § 54. Before a bank can exercise any power not expressly given, it should be clearly established that such power is essential to the proper conduct of its business and necessary to enable it properly to enjoy, use and carry out its express powers. Commercial Banking etc. Co. *v.* Citizens' Trust etc. Co., 153 Ky. 566, 156 S. W. 160, 1915C Ann. Cas. 166, n., 45 L. R. A. (N. S.) 950, n. Where a power would enable a bank to perpetuate a fraud it is not an express power, *id.*

[0a] See Restrictions, § 68.

same manner that a natural person would, if he sought to accomplish the same end. It may borrow money for those purposes, contract for labor and materials, make purchases,[0b] and give notes, bills, bonds, and mortgages in payment or as security therefor.[1]

Proceedings, though such as are usually *ultra vires*, will be proper if they are (1) necessitated by circumstances essential to the corporate well-being, (2) could not have been foreseen to be necessary at the inception of the corporation, (3) are not expressly forbidden, (4) do not amount to a course of dealing, but are matters of temporary management. As if a banker lends money on a ship and freight, and is obliged to foreclose his security, he may, and should as a prudent man, operate the ship temporarily. See § 78.

Holding Real Estate

§ 55. The statutes of mortmain took away the common law power of holding real estate.* By it "all conveyances by deed or will of realty to a body corporate, or for its use, are void, unless sanctioned by charter or act of Assembly." [1] This is law in Pennsylvania, but in other States a corporation may acquire and hold real estate so far as is necessary and convenient for the purposes of their creation; but not for objects wholly foreign.[2]

Power is usually expressly given to own realty sufficient for a place of business.[3] A national bank cannot take realty as concurrent [3] security for a loan, but may as a substantially subsequent security, and State banks are sometimes restricted in the same way. Any bank may take real estate to save a debt, and may sell any realty to which it acquires title. The effect of exceeding its powers, and buying or taking land beyond its authority, is

[0b] A national bank may take an absolute assignment of a claim for collection, and agree to pay the proceeds or a part thereof to another. Such a transfer passes the legal title. King *v.* Miller, 53 Or. 53, 97 Pac. 542 (1908).

[1] Frye *v.* Tucker, 24 Ill. 180; Smith *v.* Law, 21 N. Y. 299; Clark *v.* School District, 3 R. I. 199.

* §55. See § 74.

[1] 3 Binney, App. 626. But see Farmers' Deposit National Bank *v.* W. Pa. Fuel Co., 215 Pa. St. 115, 64 Atl. 374, 114 Am. St. Rep. 949 (1906).

[2] First Parish in Sutton *v.* Cole, 3 Pick. (Mass.) 239; State *v.* Commissioners of Mansfield, 3 Zab. (N. J.) 510; Riley *v.* City of Rochester, 5 Seld. (N. Y.) 64. See § 72 *et seq.*

[3] See Part II. § 28. And the courts are very liberal in their construction of such authority. See § 49.

usually in this country no more than the risk of forfeiture of franchise at suit of the sovereign.[3a] The title is good. §§ 74, 722.

Bequest

A corporation may receive personal property by bequest.[4]

Contracts

§ 56. A bank has power to make all such contracts as are necessary or usual as direct means [1] to attain the objects of its incorporation, and no other.[1a]

[3a] Farmers' Deposit National Bank *v.* W. Pa. Fuel Co., 215 Pa. St. 115, 64 Atl. 374, 114 Am. St. Rep. 949 (1906).

[4] The common law right of taking personal property by bequest was, we believe, always enjoyed by corporations equally with individuals, and a bequest to a corporation of its own stock is as valid as a bequest of anything else. Atk. R. 37; 2 Bro. 58; Phillips Academy *v.* King, 12 Mass. 546; In the Matter of Howe, 1 Paige Ch. (N. Y.) 214; M'Cartee *v.* Orphan Asylum Society, 9 Cow. (N. Y.) 437; Rivanna Navigation Co. *v.* Dawsons, 3 Gratt. (Va.) 19.

[1] § 56. If the means are *reasonably and directly* adapted to the ends for which the bank exists, they are proper; but *indirect* means are not allowable, though they aid the same ends; *e.g.* a bank cannot buy and sell stocks to raise money to lend or to retrieve its fortunes, nor engage in any outside business or securities except to save debt, or invest surplus, nor purchase land to prevent competition. See Restrictions, § 68.

A bank may hold cattle as a pledge for the payment of an overdraft. Farmers' Bank *v.* Wabash R. Co., 119 Mo. App. 1, 95 S. W. 286 (1906).

[1a] A bank cannot go into the mining business, and a contract that expressly requires it to do so is beyond its powers. Weston *v.* Estey, 22 Col. 334, 45 Pac. 367 (1896); nor can it enter into a contract of partnership for the building of levees. Interstate Trust Co. *v.* Reynolds, 127 La. 193, 53 So. 520 (1910); nor can it legally make a contribution for the purpose of inducing the construction of a railroad, and a note or contract executed by an Oklahoma bank as a subscription for such purpose is *ultra vires* and void, and the courts will not enforce it. Arkansas etc. Ry. *v.* Farmers' etc. Bank, 21 Okla. 322, 96 Pac. 765, 129 Am. St. Rep. 782 (1908). State banks cannot purchase interests in partnership firms and become partners thereof, nor can they indulge in the commercial business of an electric light company. Home State Bank *v.* Vandolah, 188 Ill. App. 123 (1914).

A bank cannot go into the creamery business. Rankin *v.* Emigh, 218 U. S. 27, 54 L. ed. 915, 30 Sup. Ct. 672 (1910); nor can it pledge its assets to secure the payment of a depositor. Commercial Banking etc. Co. *v.* Citizens' Trust etc. Co., 153 Ky. 566, 156 S. W. 160, 1915C Ann. Cas. 166 n., 45 L. R. A. (N. S.) 950 n.

A national bank has no power whatever to deal in merchandise of any kind, and if the legal effect of purchasing drafts with bills of lading attached is a sale of the goods represented by the transaction it is *ultra vires*. Leonhardt *v.* Small, 117 Tenn. 153, 96 S. W. 1051, 119 Am. St. Rep. 994,

Test of Right to Contract

"In deciding whether a corporation can make a particular contract, we are to consider, in the first place, whether its charter, or some statute binding upon it, forbids or permits it to make such contract. And, if the charter and valid statute law are silent on the subject, in the second place, whether the power to make such a contract may not be implied on the part of the corporation, as directly or incidentally necessary to enable it to fulfil the purpose of its existence, or whether the contract is entirely foreign to that purpose." [2]

Modern Tendency Liberal

The modern tendency is to liberal construction of corporate power to contract. The English decisions are clear that, *prima facie*, all its contracts are valid, and the burden is on the party objecting to show that the law by which it is created expressly or by necessary implication prohibits it; and the drift in the United States is in the same direction, away from the strict rule that held the power limited to that conferred or necessarily implied.[3]

A Contract is Presumed to be for Proper Purpose

1. When the charter of a corporation authorizes it to purchase land for some specified purpose, in the absence of evidence it will be presumed that any land purchased by it was acquired for purposes authorized by the charter. Even if a corporation is forbidden by its charter to hold or take a title to real estate, a conveyance of land to it is not void. It is valid until vacated by a direct proceeding by the sovereign, instituted for that purpose.[4]

6 L. R. A. (N. S.) 887 (1906). See Boyd *v.* Schneider, 124 Fed. 239 (1903). But even though a contract for building bridges is *ultra vires*, if the agent of the bank purchases groceries which are used in carrying out the contract and the bank receives the proceeds of the contract it is estopped to deny liability for the value of the groceries whether it made a profit or sustained a loss by their use. National Bank *v.* Purcell Grocery Co., 34 Okla. 34, 124 Pac. 603, 41 L. R. A. (N. S.) 494 (1912). See Griffin *v.* Wabash R. Co., 115 Mo. App. 549, 91 S. W. 1015 (1906), where the facts show that the bank was not engaging in trade within the meaning of the statute. See also McLean *v.* City State Bank, 210 Fed. 21 (1913).

[2] Angell & Ames on Corporations, § 256.

[3] Converse *v.* Norwich, etc. R. R. Co., 33 Conn. 166–179.

[4] Mallott *v.* Simpson, 94 N. C. 37.

A bond of a national bank, given to secure the payment of certain bonds

Bank may Make Agreement to Recover a Deposit Stolen

"It is competent for a national bank to take steps for the recovery of its property stolen by burglars, and to agree to take like steps for the recovery of the property of others deposited with it for safe keeping, and stolen at the same time; and want of proper diligence, care, and skill in performing such an undertaking is ground of liability to respond in damages for failure. But the evidence in this case failed to establish either such an agreement, or the want of diligence and care, and the jury was properly instructed to return a verdict for defendant." [5]

"As to the second cause of action, the facts stated in the complaint seem to us to be sufficient, if proven, to constitute a legal liability on the part of defendant. It would certainly be competent for a national bank to take measures for the recovery of its own property lost in the way described. If the loss, as in the present case, included the property of others, and it was deemed best, having reference to the bank's own interest, that these measures should be taken by the bank alone for itself and all concerned, it might lawfully undertake to act for others thus jointly concerned with itself, as well as for itself alone; and want of proper diligence, skill, and care in the performance of such an undertaking would be ground of liability to respond in damages for such failure." [5]

2. A contract whereby a person is to furnish a national bank with a certain customer in consideration of which the bank is to turn over a certain amount of fire insurance, is not one within the powers of a national bank, and the bank may avail itself of the defence of *ultra vires* if sued upon the contract.[6]

and mortgages on realty, in which it had an interest, was held not *ultra vires*. Mutual Life Insurance Co. *v.* Yates Co. National Bank, 35 App. Div. (Hun, N. Y.) 218 (1898).

[5] Wylie *v.* Northampton Bank, 119 U. S. 361, 30 L. ed. 455, 7 Sup. Ct. 268.

A national bank may represent other banks which have transferred notes and mortgages to it when all held conflicting mortgages on the same property, and sue on such notes with the understanding that the respective rights between the banks in the proceeds collected are to be determined by the ultimate result of another suit then pending, to which all were parties. Morris *v.* Third National Bank, 142 Fed. 25 (1905).

[6] Dresser *v.* Traders' National Bank, 165 Mass. 121, 43 N. E. 507 (1896); Davis *v.* Old Colony Railroad, 131 Mass. 258.

Settling Claims

§ 57. 3. It may make all arrangements necessary to the advantageous settlement of claims, by or against the company; as, for example, a compromise [1] or release. But if the arrangement involves abandonment of the bank's claim it must be necessitated by the circumstances.

Goods on Credit

§ 58. 4. It may run into debt by account with a merchant, overdraw at another bank, and, in general, make such monetary arrangements as an individual may.

Stocks and Bonds

§ 59. 5. Any bank may deal in Government securities, as we have seen. (§ 52.) A national bank cannot buy [0] or loan on the security of its *own* stock,[1] but State banks may, so far as not prohibited,[2] buy and sell and loan upon their own stock.[2a] In this country the general rule is, that any bank may loan on the security of the stocks or bonds of *other* corporations,[3] but cannot

[1] § 57. A bank may take stock in compromise of a doubtful debt owing the bank. First National Bank of Charlotte *v.* National Exchange Bank, 51 How. Pr. (N. Y.) 320.

[0] § 59. Burrows *v.* Niblack, 84 Fed. (Ill.) 111 (1898).

[1] See Part II. § 35.

[2] Mass. R. L. c. 115, §§ 31–32, allow a bank to loan on its own stock to an amount not beyond one half the paid capital; but it must not *purchase* its stock, nor hold it more than six months after it becomes the property of the bank through non-payment of the loan.

In Minnesota it has been held that a State bank cannot, directly or indirectly, purchase shares of its own stock. St. Paul Trust Co. *v.* Jenks, 57 Minn. 248, 59 N. W. 299.

In Kansas the Court say that the bank's power to purchase may well be doubted. Abilene State Bank *v.* Strachan, 87 Kan. 577, 132 Pac. 200 (1913). See also Kassler *v.* Kyle, 28 Colo. 374, 65 Pac. 34 (1901).

[2a] See § 77.

[3] And sell them if necessary to save the debt. Third National Bank of Baltimore *v.* Boyd, 44 Md. 47; Talmage *v.* Pell, 3 Seld. (N. Y.) 328; Dearbourn *v.* Union National Bank, 58 Me. 273 (1870); Kennedy *v.* Savings Bank, 101 Cal. 495; California Bank *v.* Kennedy, 167 U. S. 362, 366, 367, 42 L. ed. 200, 17 Sup. Ct. 831 (Cal. 1897), citing National Bank *v.* Case, 99 U. S. 628, 25 L. ed. 448; First National Bank *v.* National Exchange Bank, 92 U. S. 122, 128, 23 L. ed. 679; Latimer *v.* Citizens' State Bank, 102 Iowa 162, 71 N. W. 225 (1897); Chemical National Bank *v.* Havermale, 120 Cal. 601, 52 Pac. 1071 (1898); Hotchkin *v.* Third

buy[3a] and sell them,[4] except to save a debt,[5] or in order to deposit them under a law requiring such stocks to be given as security for circulation, or by reason of other express authority.[6] But although, under statute, a national bank is not authorized to purchase its own stock, stock so purchased is not void, and where a subsequent purchaser acquires the stock through a simulated holder for the bank, in ignorance of the fact that the bank had employed its funds in placing the stock, in the name of such simulated owner, and pays therefor in good faith, the title so obtained is good against the bank and its creditors.[7] For the consequence of dealing in stock beyond its power, see *Ultra vires*, § 722.

National Bank, 219 Mass. 234, 106 N. E. 974 (1914); Corn Exchange National Bank *v.* Kaiser, 160 Wis. 199, 151 N. W. 259, (1915); Fulton *v.* National Bank, 26 Tex. Civ. App. 115, 62 S. W. 84 (1901).

[3a] The banking department of the citizens' bank of Louisiana was a new creation under the Act of 1853. It was not liable for the bonds of the State in aid of said bank and having the power of conducting a general banking business it had the capacity to purchase as an investment of separate funds or in current business, the bonds of the State issued in aid of the citizens' bank the same as any other bank or third person could. Hope *v.* Board of Liquidation, 108 La. 315, 32 So. 547 (1902).

[4] It is no part of the banking business to engage in "traffic" in merchandise or financial securities, nor is dealing in stocks an incident of the business in its regular course. Sackett's Harbor Bank *v.* Lewis Co. Bank, 11 Barb. (N. Y.) 213; Weckler *v.* First National Bank, 42 Md. 581; Franklin Bank of Cincinnati *v.* Commercial Bank, 36 Ohio St. 350; First National Bank *v.* Hawkins, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. 739 (1899); Chemical National Bank *v.* Havermale, 120 Cal. 601, 52 Pac. 1071 (1898); California Bank *v.* Kennedy, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. 831 (Cal. 1897), and citations; Hotchkin *v.* Third National Bank, 219 Mass. 234, 106 N. E. 974 (1914); First National Bank *v.* Converse, 200 U. S. 425, 50 L. ed. 537, 26 Sup. Ct. 306 (1906).

Under the Missouri statute a State bank may handle negotiable bonds. Mount Vernon Bank *v.* Porter, 52 Mo. App. 244. See § 77.

[5] Union National Bank *v.* Hunt, 7 Mo. App. 42; Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370; First National Bank of Charlotte *v.* National Exchange Bank, 51 How. Pr. (N. Y.) 320; Latimer *v.* Citizens' State Bank, 102 Iowa 162, 71 N. W. 225 (1897).

And a bank cannot, even to pay a debt, take shares in a corporation organized for speculative purposes. First National Bank *v.* Converse, 200 U. S. 425, 50 L. ed. 537, 26 Sup. Ct. 306 (1906); or in a partnership organized for similar purposes. Merchants National Bank *v.* Wehrmann, 202 U. S. 295, 50 L. ed. 1036, 26 Sup. Ct. 613 (1906).

[6] See, as to stocks required for circulation basis, Mass. R. L. c. 115, § 63. In absence of statutory authority one corporation cannot hold stock of another. Franklin Bank of Cincinnati *v.* Commercial Bank, 36 Ohio St. 350.

[7] Wallace *v.* Hood, 89 Fed. (Kan.) 11 (1898).

Saving Debt

§ 60. 6. To save a debt, a bank may take real estate or personal property, by conveyance or purchase at foreclosure sale of a mortgage held by it as collateral, or otherwise, and may hold such property, not permanently, but a reasonable time, to enable it to realize advantageous sale of it.[1] A bank may even engage temporarily[2] in a business entirely foreign, in order to save its claim, and in short may do any act a prudent man would do under the same circumstances for that purpose. See § 78.

Surplus Capital. Idle Property

§ 61. 7. It is a general principle that a corporation may invest surplus capital, that it is unable to make use of in its business, in outside investments; for example, a bank may *buy*[1] notes, to sell them at a profit, with such capital. Any property which it cannot, by reason of special circumstances, make immediate use of to advantage, in its proper business, may be let or transferred. A ferry company can lease one of its steamers,[2] a hotel company may temporarily let a part of its building for offices, and no doubt a bank may rightfully let or sell on the same principle.

Alienation of Property. Gift

§ 62. 8. A bank, unless restricted, can alienate[1] or mortgage[1a] its property, real or personal, in whole or part, but *not its fran-*

[1] § 60. Stone *v.* Rottman, 183 Mo. 552, 82 S. W. 76 (1904).

[2] A bank cannot run a coal business for four years at a continual loss. Stone *v.* Rottman, 183 Mo. 552, 82 S. W. 76 (1904).

[1] § 61. See Lazear *v.* National Union Bank (Md.), 12 Leg. News, 64.

[2] Brown *v.* Winnisimmet Co., 11 Allen (Mass.) 326.

[1] § 62. Sharswood in 8 Phil. 94. Corporations aggregate have at common law an incidental right to alien or dispose of their lands and chattels, unless specially restrained by their charters or by statute. Independent of positive law, all corporations have the absolute *jus disponendi*, neither limited as to objects, nor circumscribed as to quantity. Co. Lit. 44 *a*, 300 *b*; 1 Sid. 161, note at the end of the case. The case of Sutton's Hospital, 10 Co. 30 *b*; 1 Kyd on Corp. 108; Com. Dig. tit. Franchise, F. 11, 18; 2 Kent, Com. 280; Mayor of Colchester *v.* Lowten, 1 Ves. & B. 226, 237, 240, 244; Binney's case, 2 Bland Ch. (Md.) 142.

By statute in New York (c. 409, 1882, §§ 186, 187) a bank cannot transfer, assign, or convey property exceeding $1000, except in the transaction of its ordinary business or in pursuance of a previous vote of the board of directors. The transfer of three bills at one time, which in the aggregate exceed $1000, is a violation of the law, although no one of the

chises, for these are special privileges that cannot be delegated nor acquired by any other method than that prescribed by statute, or by special act of the legislature. But a bank, being instituted partly for the benefit of its stockholders, cannot *give* away its property unless with the consent of them all. A donation of the funds of a bank in aid of a project outside the regular banking business is invalid,[2] for example a donation to induce a manufacturing company to remain in town.[3]

Borrowing

§ 63. 9. So far as it is involved in receiving deposits, borrowing is a part of banking, but borrowing *stricto sensu,* taking a loan for *a definite time,* instead of one payable on demand as ordinary deposits are, is not[1] a part of the business of banking, nor a necessary incident thereof, as a *continuous practice;* but (like every other corporation in the United States) a bank has[2] an inherent

bills exceeds the statutory amount. Atkinson *v.* Rochester Printing Co. 114 N. Y. 168, 21 N. E. 178.

[1a] Roberts *v.* Washington National Bank, 11 Wash. 550, 40 Pac. 225 (1895).

[2] Robertson *v.* Buffalo County National Bank, 40 Neb. 235, 58 N. W. 715 (1894).

[3] McCrory *v.* Chambers, 48 Ill. App. 445.

[1] § 63. The business of a bank is to lend, not borrow; to discount the notes of others, not to get its own discounted. A bank under certain circumstances may be a temporary borrower on time, and give its note on time; but such transaction would be so out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the agent acting for the bank had special authority to borrow the money. Adams *v.* Cook Co. National Bank, Blodgett, J., quoted Ball on National Banks, 54. Even, therefore, if it be conceded that it is within the powers of the board of directors to borrow on time, it is yet obvious that a vice-president, however general his powers, cannot exercise such a power unless specially authorized so to do, and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers. Western National Bank *v.* Armstrong, 152 U. S. 346, 351, 352, 38 L. ed. 470, 14 Sup. Ct. 572 (1893).

A national bank finding itself embarrassed with a large amount of assets much in excess of its obligations, yet without the cash to make payment of those which are due and urgent, may borrow money to meet these pressing demands. Wyman *v.* Wallace, 201 U. S. 230, 50 L. ed. 738, 26 Sup. Ct. 495 (1906). See Bryon *v.* First National Bank, 75 Or. 296, 146 Pac. 516 (1915). And the fact that the bank is insolvent at the time does not impair its right to negotiate the loan and give security therefor. Harris *v.* Randolph County Bank, 157 Ind. 120, 60 N. E. 1025 (1901).

[2] City Bank of Columbus *v.* Beach, 1 Blatchf. (C. C.) 425; Bank of Augusta *v.* Earle, 13 Pet. 519, 10 L. ed. 274; People *v.* Oakland County Bank, 1 Dougl. (Mich.) 282; Tombigbee R. R. Co. *v.* Kneeland, 4 How.

right to borrow money whenever it is reasonably necessary in the proper conduct of its business, unless specially restricted.[3] The privilege is the child of necessity, and is limited by the same necessity or intrinsic propriety which gives it birth. The borrowing must be incidental to the legitimate banking business of the association, otherwise the act is *ultra vires;* as if the money is obtained for speculation.[4] Aside from the theory of law, as no one but the bank can well judge whether a loan is reasonably necessary or not, the practical fact is that a bank can borrow whenever it wishes to, and if the money is used in its proper business no fault will be found, and even if wrongly applied it will not affect the validity of the loan as between the parties ordinarily. (See *Ultra vires.*)

For express statutory provisions, see § 69.

Negotiable Instrument on Time. Security Mortgage, etc.

Whenever a bank may rightfully borrow on time, it can give its negotiable note on time,[1] and a bank may secure persons who loan it money by deposit [4a] or on time by a mortgage of its property, (but not of its franchises,) and may establish [5] an investment department, in which certificates issued for loans and deposits are secured by the transfer to a trustee of negotiable paper, to be held by him solely for the benefit of depositors and others dealing with the bank, and thereby give them precedence over its general creditors not so secured. Such a power is a mere incident of the right to receive deposits, which by necessary implication gives power to assign and mortgage negotiable instruments as security for them,[5] and to do all other acts that the nature of such business

16, 11 L. ed. 855. See also 6 Mo. App. 333; and Donnell *v.* Lewis Co. Savings Bank, 80 Mo. 165.

[3] See § 70.

[4] Curtis *v.* Leavitt, 15 N. Y. 9; Barnes *v.* Ontario Bank, 19 *id.*, 152; Leavitt *v.* Yates, 4 Edw. Ch. (N. Y.) 134; Safford *v.* Wyckoff, 4 Hill (N. Y.) 442; Talman *v.* Rochester City Bank, 18 Barb. (N. Y.) 123.

[4a] See Commercial Banking etc. Co. *v.* Citizens' Trust Co., 153 Ky. 566, 156 S. W. 160, 1915C Ann. Cas. 166, n., 45 L. R. A. (N. S.) 950, n., to the effect that a bank has no power to secure deposits unless express authority is given therefor by statute. See Citizens' Bank *v.* Bank of Waddy, 126 Ky. 169, 103 S. W. 249, 128 Am. St. Rep. 282, 11 L. R. A. (N. S.) 598 (1907).

[5] Ward *v.* Johnson, 95 Ill. 215.

Under California statutes of April 11, 1862, a bank has no power to contract any debt for borrowed money, or for money paid out at its request in discharge of its obligations to a depostior. Such a contract is *ultra vires* and cannot be enforced. Laidlaw *v.* Pacific Bank, 137 Cal. 392, 70 Pac. 277 (1912).

involves, on the principles of prudent commercial conduct. The rediscounting of bills and notes is a form of borrowing money, and is not, as a matter of law, out of the usual course of business so as to charge every one connected therewith with the knowledge that it may be in excess of authority.[6]

Checks and Indorsement

§ 64. All corporations have power to draw checks and *indorse* them and any other negotiable paper properly coming to them, as when they receive a payment in that form.

Lending Credit. Guaranty. Surety. Accommodation

§ 65. 10. Neither as included in its powers nor incidental to them is it a part of a bank's business to lend its credit.[1] If a bank could lend its credit as well as its money, it might, if it received compensation and was careful to put its name only to solid paper, make a great deal more than any lawful interest on its money would amount to. If not careful, the power would be the mother of panics, and if no compensation was received, there is the additional reason, if any is needed, that such a power is in derogation of the rights and interests of stockholders, and at all events could only be exercised with the consent of all.

Indeed, lending credit is the exact opposite of lending money,

[6] Auten *v.* National Bank, 174 U. S. 125, 43 L. ed. 920, 19 Sup. Ct. 628 (1899). Another United States case has held that a rediscount of paper is more like a sale than a borrowing. U. S. National Bank *v.* First National Bank, 79 Fed. 296.

Long habit of a bank of rediscounting its bills, usage of other banks in the locality to do the same, and knowledge of the directors, will estop the bank to deny the authority of the officers procuring the rediscount. *Ibid.*

[1] § 65. A national bank cannot lend its credit. It has no power on deposit of collateral security to guarantee the obligation of the person making the deposit. Seligman *v.* Charlottesville National Bank, 3 Hughes 647. The counsel argued that a bank could borrow money to aid its customers, but the court said that lending its credit was another thing, and not within nor incidental to any of the specified powers of the bank. It does, upon analysis, seem clear that, however much on the surface of things borrowing to lend may resemble lending credit, there is a substantial difference in just the points that make lending credit objectionable. 1st. If a bank lends money obtained on credit it only puts the money in its possession at risk *once*, while by lending credit it may put the same money under an indefinite number of risks. 2d. By lending money it can only make interest on money, and not on breath and ink, as it could by lending credit.

which is the real business of a bank, for while the latter creates a liability in favor of the bank, the former gives rise to a liability of the bank to another.

Accommodation Surety

It is uniformly held, therefore, that a bank cannot be an accommodation indorser or acceptor,[2] — although if it transcends its power in this respect, it does not follow the contract is void (see *Ultra vires*) as to third parties without notice, though it will be totally void in the hands of one having notice, — nor be surety for another in any business in which it has no interest and can derive no profit; as, for example, the guaranty of a building contract.[3]

[2] Johnson *v.* Charlottesville National Bank, 3 Hughes 657; National Bank *v.* Atkinson, 55 Fed. 465; Bowen *v.* Needles National Bank, 87 Fed. 430 (1898).

[3] "If, in the course of its business, the bank finds it necessary to indorse for transfer, or otherwise specially guarantee negotiable commercial paper, (People's Bank *v.* National Bank, 101 U. S. 181, 25 L. ed. 907,) it will not be claimed that the guaranteeing of other written contracts is included within any of its powers, general or special, or is necessarily incidental. It is no part of the business of a bank, nor necessarily incidental to it, to guarantee a building contract, or one for furnishing building materials; and the defendants had no power to make the guaranty which is the subject of this action." Norton *v.* Bank, 61 N. H. 592; Commercial National Bank *v.* Pivie, 82 Fed. 799 (1897); Bowen *v.* Needles National Bank, 87 Fed. 430 (1898); Watts *v.* Wells, 7 Montreal L. R. (Q. B.) 387; First National Bank *v.* Munroe, 135 Ga. 614, 69 S. E. 1123 (1910); National Bank *v.* Sixth National Bank, 212 Pa. St. 238, 61 Atl. 889 (1905); Cottondale State Bank *v.* Oskamp Nolting Co., 64 Fla. 36, 59 So. 566 (1912); Mine etc. Supply Co. *v.* Stockgrowers' Bank, 173 Fed. 859 (1909); Fidelity etc. Co. *v.* National Bank, 48 Tex. Civ. App. 301, 106 S. W. 782 (1908); Merchants' Bank *v.* Baird, 160 Fed. 642 (1908); Barron *v.* McKinnon, 179 Fed. 759 (1910); Commercial National Bank *v.* First National Bank, 97 Tex. 536, 80 S. W. 601 (1904); First National Bank *v.* Commercial National Bank, 99 Tex. 118, 87 S. W. 1032 (1905); First National Bank *v.* American National Bank, 173 Mo. 153, 72 S. W. 1059 (1903); Sturdevant Bros. *v.* Farmers' etc. Bank, 69 Neb. 220, 95 N. W. 819 (1903); Third National Bank *v.* St. Charles Sav. Bank, 244 Mo. 554, 149 S. W. 495 (1912); Bailey *v.* Farmers' National Bank, 97 Ill. App. 66 (1901); Appleton *v.* Citizens' Central National Bank, 116 App. Div. 404 (1906), 101 N. Y. S. 1027; Fidelity etc. Co. *v.* National Bank, 48 Tex. Civ. App. 301, 106 S. W. 782 (1908).

But if a cashier of a bank makes a contract of guaranty which is beyond his power and authority, and the bank secures a profit therefrom it cannot urge its non-liability thereon on a place of *ultra vires*. Crowder State Bank *v.* Ætna Powder Co., 41 Okla. 394, 138 Pac. 392 (1914); First National Bank *v.* Greenville Oil etc. Co., 24 Tex. Civ. App. 645, 60 S. W. 828 (1901). There may be a recovery on an implied contract. Citizens' Central National Bank *v.* Appleton, 216 U. S. 196, 54 L. ed. 443, 30 Sup. Ct. 364 (1910).

May Warrant Goods, and Guarantee or Indorse Negotiable Paper

But a warranty of goods sold by the bank, or an indorsement [3a] or guaranty [4] of a note negotiated by it, is perfectly lawful; for, besides being rendered necessary and proper by the usual habit of business and by the nature of the case, such transactions are not open to the objections above. They are not contracts upon air; the bank receives value and has a real interest; with reasonable care the chance of loss is small, no greater than in many other acts necessary in carrying on its business, (no sum of money is put at more than two risks [5] by such transactions,) and even

[3a] A national bank in negotiating its paper can bind itself for payment thereof by its indorsement thereon. First National Bank *v.* Munroe, 135 Ga. 614, 69 S. E. 1123, 32 L. R. A. (N. S.) 550 (1910); State *v.* Corning Savings Bank, 139 Iowa 338, 115 N. W. 937 (1908).

[4] People's Bank *v.* National Bank, 101 U. S. 181, 25 L. ed. 907; State *v.* Corning Savings Bank, 139 Iowa 338, 115 N. W. 937 (1908); Merchants' Bank *v.* Baird, 160 Fed. 642 (1908); Appleton *v.* Citizens' Central National Bank, 116 App. Div. 404 (1906), 101 N. Y. S. 1027. A bank may transfer paper by indorsement waiving demand and notice, and there is no reason why it should not give a guarantee a less onerous obligation. Where a president of a bank negotiates, for value, certain notes, and at the same time executes, in the name of the bank, a written guaranty of payment, his authority to execute such guaranty will be conclusively presumed in favor of a purchaser acting without notice to the contrary. Thomas *v.* City National Bank, 40 Neb. 501, 58 N. W. 943 (1894); Rich *v.* State National Bank, 7 Neb. 201.

A bank may make a guaranty for the protection of its own rights or as an incident to the transaction of its business. Creditors' Claim etc. Co. *v.* Northwest etc. Co., 81 Wash. 247, 142 Pac. 670 (1914). But the bank's power to make a guaranty is limited to the protection of its own rights or to an incident to the transaction of its own business. Ayer *v.* Hughes, 87 S. C. 382, 69 So. 657 (1910). It may guarantee the bonds of a railroad company of which it owns a majority of stock when such guaranty is made for its own purposes and advantages. Central R. & Banking Co. *v.* Farmers' Loan etc. Co., 114 Fed. 263 (1902). And an agreement to honor a draft drawn upon one of its customers in payment of a car load of berries is not *ultra vires*. Farmers' etc. National Bank *v.* Illinois National Bank, 146 Ill. App. 136 (1908).

When a national bank guarantees the payment of a sum borrowed by A. in order that it may receive from A. what he owes to it, it is liable on the guaranty for the amount which it has received from the amount borrowed. Appleton *v.* Central National Bank, 190 N. Y. 417, 83 N. E. 470 (1908).

[5] It may lend the money received for the goods or note, one risk; and the warranty constitutes another, but, with care in acquiring the property or note, not a large one; and at any rate the total risk is only such as is necessarily incident to business transactions, and no door is opened, as in the case of lending credit, to the indefinite accumulation of risks piled panic high on a narrow foundation of cash and the frail ice of public

if loss occurs it is attributable to the carelessness or misfortune of the bank in *acquiring* the subject matter, not in guaranteeing it, and such agreements are not dangerous to the financial health of the community, but beneficial to it.

Dividends. Surplus

§ 66. 11. A bank can pay dividends out of its *earnings* (and not out of anything else), or it may, and, if so provided, *must* keep the whole or a part of its profits for a surplus fund.[1]

§ 67. 12. In the absence of express provision, a bank may decline to enter upon, or discontinue the exercise of, any severable part of its franchises or business; for example, a bank may receive special deposits or not, as it chooses, or act as a collecting agent or not.

But continued abandonment of its entire business, or neglect of any function that is also by the organic law a duty, may be a cause of forfeiture. See §§ 68, 69, and 722.

§ 68. **Restrictions.** — Having examined what a bank *can* do, it may be well to glance briefly at the law from the opposite point of view, and note what a bank *cannot do*. When you have driven a nail, it is a good thing to hammer it a little on the under side. This region of No Power is traversed by three lines in different directions.

1. The restrictions are such as exist at common law, or are express, which last may be declaratory of, or in derogation of, the common law.

2. They may be *absolute*, or such as place the acts to which they relate beyond the power of the bank for any purpose or under any circumstances; or *conditional*, allowing the act under some circumstances or for special purposes, and prohibiting it under or for others. This distinction is of much weight in considering the law of *ultra vires*.

3. Violation of any restriction may or may not cause forfeiture, according to the principles set forth in § 722 *et seq.*

§ 69. **Express Restrictions.** — These must be looked for in the organic law of each bank. Each charter may differ from every other; but to indicate the nature of the limitations to be expected,

credulity, that may at any time give way, and the whole structure be engulfed.

[1] § 66. Bank of Utica *v.* City of Utica, 4 Paige (N. Y.) 399.

we will enumerate the most important ones found in the National Banking Law and in the statutes of Massachusetts, adding a few words about restrictions relating to the formalities of contracts.

Place

(*a*) Business is not to be done away from the bank.[1] (Mass. & U. S.)

Time

(*b*) Bank not to begin business till one half the capital is paid, and the organization certificate is made, and, in the case of a national bank, not until the comptroller issues his authorization certificate.[2] (Mass. & U. S.)

Traffic

(*c*) Not to engage in trade or commerce.[3] (Mass.)

Debts and Loans

(*d*) Not to go into debt beyond a specified limit.[4] (Mass. & U. S.)

(*e*) Not to borrow on time, except from the State, or a Massachusetts savings bank, or in the way of deposit by an assignee in insolvency;[5] and where the bank cannot borrow on time, it cannot issue time paper. (Mass.)

(*f*) Not to make a loan or discount, except it is to be paid on demand, and every loan or discount otherwise made is *expressly void*, and the bank forfeits $500 for each offence.[6] (Mass.)

(*g*) Not to allow debts due to itself to accumulate beyond a fixed limit.[7] (Mass.)

(*h*) Not to loan on security of its own stock (Nat.),[7] or only to a limited extent (Mass.).[8] (Mass. & U. S.)

[1] § 69. See Part II. § 8, and Mass. R. L. c. 115, § 30, no loan or discount, or issuance of note, away from bank. See § 46.

[2] Mass. R. L. c. 115, § 3. See Part II. §§ 8, 14.

[3] Mass. R. L. c. 115, § 38. See above, § 47.

[4] See Part II. § 36. The Mass. R. L. c. 115, §§ 33, 34, limit debts due to or from (a) bank to twice paid capital, not including deposits or debts due to or from a bank, or from the United States or the State.

[5] Mass. R. L. c. 115, § 40.

[6] Mass. R. L. c. 115, § 51.

[7] See Part II. § 35.

[8] Mass. R. L. c. 115, § 31, not beyond one half capital paid in.

(*i*) Not to allow one person or company to be liable to the bank to a greater amount than one tenth of the bank's capital.[9] (U. S.)

(*j*) Not to loan to its officers beyond a certain limit, unless by vote of stockholders.[10] (Mass.)

(*k*) Not to loan to any manufacturing corporation whose financial officer is cashier of the bank.[11] (Mass.)

(*k'*) Not to loan to any bank examiner.[11a] (U. S.)

Real Estate

(*l*) Not to take real estate security for concurrent or future loans, nor hold realty for other than the specified purposes.[12] (U. S.)

(*m*) Not to hold more real estate than is equivalent to twelve per cent of its capital, except what it receives as security for or in payment of debts.[13] (Mass.)

Interest

(*n*) Not to take interest, or discount, beyond a specific limit.[14] (U. S.)

(*o*) Not to pay interest, except on money borrowed of the State, or of a Massachusetts savings bank, or an assignee in insolvency, or on debts due another bank, or a town or city of Massachusetts.[15]

Circulation

(*p*) Not to pledge its circulation nor use it in any way to increase its capital.[16] (U. S.)

(*s*) Not to refuse to redeem its circulation, under penalty of dissolution and forfeiture of the bonds it has deposited with the United States.[17] (U. S.)

(*t*) Not to pay out certain bills.[18] (U. S.)

(*u*) Not to issue more than a given quantity of notes of specified denominations.[19] $100 penalty. (Mass.)

[9] See Part II. § 29.
[10] Mass. R. L. c. 115, § 53.
[11] Mass. R. L. c. 115, § 54.
[11a] Fed. Res. Act. Sec. 22, Part II. § 189.
[12] See Part II. § 28.
[13] Mass. R. L. c. 115, § 39.
[14] See Part II. § 30.
[15] Mass. R. L. c. 115, § 40.
[16] See Part II. § 37.
[17] See Part II. §§ 46–50.
[18] See Part II. § 39.
[19] Mass. R. L. c. 115, § 74.

Capital

(*v*) Not to withdraw any part of capital by dividends, etc.[20] (U. S.)

Provisions Relating to Form[1]

Directory or Imperative

§ 70. (*w*) When a statute says the contracts of a bank shall be signed in a particular way, or by particular officers, opinions

[20] See Part II. § 38.

[1] § 70. Note on the Use of the Corporate Seal in making Corporate Contracts. — The old rule of law was, that a corporation could do no act save by a deed executed under its corporate seal. But this ancient principle has of late years been done away with by the compulsion of the practical necessities of business; and in our land and our time corporations without number transact their affairs with a very infrequent use of this once indispensable formality. In the case of The Bank of Columbia *v.* Patterson's Administrator, 7 Cranch 299, 3 L. ed. 351, the Supreme Court of the United States first absolutely declared that the old rule could no longer be regarded as law, and the same has been since consistently and frequently held, in cases not only of banks, but of various other species of corporations. Fleckner *v.* Bank of United States, 8 Wheat. 338, 5 L. ed. 631; Mechanics' Bank of Alexandria *v.* Bank of Columbia, 5 *id.*, 326, 5 L. ed. 100; Stamford Bank *v.* Benedict, 15 Conn. 437; Ridgway *v.* Farmers' Bank, 12 Serg. & R. (Pa.) 256; Fishmongers' Company *v.* Robertson, 5 Man. & Gr. 131; 6 Scott, N. R. 56. But the practical effect of the old rule is reduced to a low point by the doctrine that the class of corporations which are creatures of a statute, whether general or special, are not within the force of the common law rule.

Then, too, the ancient rule simply required that, when the corporation *itself* performed an act, that act should be done by deed and with the seal. This rule, strictly construed, still leaves the corporation free to create agents to whom it may delegate power to act for it, and the acts of such agents, though binding the corporation, are yet not primarily the acts of the corporation, and so need not be performed by deed nor evidenced by seal. Such are the two favorite methods which jurists have adopted for annulling without breaking an ancient and time-honored principle. Either artifice accomplishes sufficiently satisfactorily the desired end. Though to make the former apply it is essential that there should be a statutory enactment, which is not wholly silent concerning the government or appointment of officers of the corporation; and the latter is available only when the deed and corporate seal appear somewhere in the chain of proceedings. For the corporation must act somewhere and at some time in creating the original agency and making the primal delegation, and this act must be accompanied by the common law formalities, since it cannot receive the protection of the agency theory. But the simple truth is, that the elastic expansion of modern business has irrevocably snapped the clumsy and useless ligament which older generations found less intolerable. Judges, in evading the rigidity of an antiquated

differ whether it is to be construed as merely declaring that a contract so executed will be sufficiently executed beyond cavil, but not excluding other methods,[2] or it is to be considered as indicating the only valid way in which the corporation can execute its contracts.[3]

Do not Affect Matters of Daily Routine not Involving Direct Action of the Corporation

But such a provision is held not to affect the ordinary contracts made by a cashier as an inherent part of his office, for these are not made by the corporation directly, and great inconvenience would follow construing such a provision to cover these matters of daily and hourly routine.[3] (See *Ultra vires*, and Informality, § 722.)

Common Law Restrictions

A Brief Restatement of the Negative Side of §§ 47–67

§ 71. (*a*) A bank cannot sell or mortgage its franchises. (If it does, it will be a case of "absolute *ultra vires*", for no fact can obscure such a transaction.)

(*b*) A bank cannot *give* away its property, except by consent of all the stockholders, though the directors can release a claim as part of an arrangement the whole of which is for the advantage of the bank under the circumstances.

(*c*) Nor traffic in merchandise, stocks, or securities.

(*d*) Nor act as agent in dealing in them, except as stated in § 59.

(*e*) Nor be an accommodation indorser (except, perhaps, by consent of all the stockholders).

(*f*) Nor be a surety, except so far as is necessarily incidental to its business.

(*g*) Nor lend its credit in any way.

(*h*) Nor "purchase" negotiable paper, in the sense of taking it free from the taint of usury.

dogma of the law, have simply yielded to that pressure of invincible necessity which the developments in the conduct and systems of the business world are every day bringing to bear upon old-world legal technicalities. It would only drag the law into contempt to declare that it requires every check or draft, every loan or discount, every indorsement or transfer, made by a bank, to be evidenced by a corporate deed and seal.

[2] Barnes *v.* Ontario Bank, 19 N. Y. 152.

[3] See Safford *v.* Wyckoff, 4 Hill (N. Y.) 442.

(*i*) Nor issue notes to circulate as money without special authority.

(*j*) Nor borrow on time, except for banking necessities.

(*k*) Nor engage in any foreign business, except so far as necessary to keep surplus capital employed, or to save a debt.

(*l*) Nor declare dividends out of its capital. Nor assess shares, unless authorized by law, or by express agreement of the shareholders.[1] There is no inherent power to call on the stockholders for more funds to aid the bank's business, after they have paid the amount of their stock. But if authorized, the bank may issue new shares, giving the existing stockholders the preference.

[1] § 71. Tippets *v.* Walker, 4 Mass. 595; Knowles *v.* Beaty, 1 McLean 41; Palmer *v.* Ridge Mining Co., 34 Pa. St. 288.

CHAPTER VII

EXPANSION OF THE POWERS OF A BANK IN REFERENCE TO PURCHASE OF NEGOTIABLE PAPER,[a] HANDLING STOCKS, DEALING IN REAL ESTATE,[b] AND SAVING DEBTS

§ 72. Power of Purchase. §§ 49, 722.
Cases affirming power to purchase, *i.e.* to acquire absolute title; title otherwise than by loan.
(*a*) Massachusetts.
(*b*) South Carolina, Iowa, Texas.
(*c*) Ohio.
(*d*) Kansas, Kentucky.
(*e*) New York.
(*f*) Illinois.

§ 73. Cases denying such Power. §§ 49, 722.
(*a*) Minnesota.
(*b*) Maryland. Lazear Brothers' case, and dissent.
(*c*) Cases in form denying the power of purchase, but using the word only in the sense of power to buy *at any agreed price*, without reference to usury laws, which is all they really deny.

§ 74. Real Estate. § 12, n. 4, §§ 54, 169, 747; II. §§ 28, 228.
May hold realty enough for its business.
May buy in outstanding title of land mortgaged to it.
Power to sell implied from power to buy.
Power liberally construed.
(*a*) May buy, build on, and sell lots adjoining the bank as a precaution against fire.
(*b*) *Ultra vires* purchase, — only sovereign can object. §§ 75 (*c*), 750.
(*c*) Previous debts in New York mean concurrent debts.
(*d*) State bank loans on real estate.

§ 75. National bank powers in respect to real estate.
(*a*) Trust deed for concurrent loan or future advances probably good (the bank being the *cestui*), though a mortgage would be bad, because it gives title, and therefore
(*b*) violates R. S. § 5137. See Union National Bank *v.* Matthews, U. S. S. C.

[a] See Fed. Res. Act. Sec. 14, Part II. § 154.
[b] See Fed. Res. Act. Sec. 24, Part II. § 192.

(*d*) Loan on personal security is good, although a mortgage is also taken.
(*e*) The *note* may be concurrent if the *debt* was previous.
(*f*) Trust deed to a third party for benefit of bank held good.

§ 76. Bank may be trustee of real estate at common law. See (*b*) but *contra* (*e*).
(*a*) New York law.

§ 77. Stocks. §§ 59, 164; II. § 35.
National bank cannot buy its own stock; no titles passes. § 59.
A bank may buy to save debt.
May hold other stocks as collateral, but cannot traffic or speculate in them.
(*a*) National bank cannot sell railroad bonds on commission.
(*b*) But may take to save debt.

§ 78. Saving Debts. §§ 60, 77 *a*, *b*.
May carry on an iron mill in order to make itself good.
May buy in land or outstanding title, or may sell its claim and transfer the note.

§ 72. **Affirmative Cases on the Power of Banks to purchase Negotiable Paper**, and whether Discounting covers more than lending on responsibility of the transferrer. See Alvey's dissent, § 73 *b*.

(Mass.) (*a*) Dealing in *checks* is part of the usual business of banking, and would be within the general powers of a bank without special mention. But II. § 8, in the clause relating to discounting and negotiating promissory notes and other evidences of debt, gives express power to *buy* checks of the individuals, whether payable to bearer or order.[1]

(S. C.) (Iowa) (Tex.) (*b*) A draft drawn by a seller against a buyer in favor of a national bank, by which it is discounted or *purchased* with the bill of lading attached, *passes title to the* goods and draft to the bank.[1a] The draft is a bill of exchange, and its *purchase is not beyond* the powers conferred by Congress upon national banks.[2]

(Ohio.) (*c*) In a case concerning the purchase of an inland draft

[1] § 72. First National Bank *v.* Harris, 108 Mass. 514.

[1a] Ayres *v.* Dorsey Produce Co., 101 Iowa 141, 70 N. W. 111 (1897).
The indorsement and delivery of a bill of lading to a bank as collateral security for paper discounted invests the bank with title to the goods and it is not required, in order to protect its lien, to have the papers recorded under the Virginia Code, Sec. 2445. Seward *v.* Miller, 106 Va. 309, 55 S. E. 681 (1904).

[2] Union National Bank *v.* Rowan, 23 S. C. 339. But the United States cases cited, viz. Union National Bank *v.* Matthews, 98 U. S. 621, 25 L. ed. 188, and National Bank *v.* Whitney, 103 U. S. 99, 26 L. ed. 443, seem only to support the proposition, that, whether a bank has power to buy negotiable paper or not, only the United States can object. Freeman *v.* Bank of Commerce, 3 Tex. App. 338 (1887); Ayres *v.* Dorsey Produce Co., 101 Iowa 141, 70 N. W. 111 (1897). It was held in the latter case that the provision

or bill of exchange, the court used the following comprehensive language: "It seems to be the idea of counsel making the objection, that negotiable paper, perfect and available in the hands of the holder, is not the subject of purchase by a national bank at any rate of discount. This view we think entirely erroneous. *We see nothing in the act of Congress, nor in reason, why a borrower may not obtain the discount by a bank of the existing notes and bills of others of which he is the holder, as well as of his own paper made directly to the bank. It is true that, as between natural persons, the purchase of such paper, when made in good faith, and not as a disguise for a loan, is not subject to the usury laws; but it is otherwise as to a bank.* In the business of banking, the purchasing and discounting of paper is only 'a mode of loaning money.'" [3]

(Kansas.) (Ky.) (*d*) Purchase may be by discount.[3a] In the case of individuals the purchase of negotiable paper, when in good faith and not a disguise for a loan, is not the subject of usury laws. It is otherwise as to a bank; it may buy, or simply loan money to the owner, holding him responsible; in either case, it must not gain more than the legal interest in advance.[4]

(N. Y.) (*e*) Statutory authority to discount includes power to buy notes.[5]

To buy or purchase a debt is always in commerce termed to discount it.[5]

"To discount includes to buy, for discounting is at most but another name for buying at a discount." [6]

that a national bank cannot hold title to any property, except in satisfaction of a previous indebtedness, did not apply.

A bank may hold a note for its own accommodation under the ordinary relationships governing accommodation paper. Westwater *v.* Lyons, 193 Fed. 817 (1912).

[3] Smith *v.* Exchange Bank, 26 Ohio St. 141.

[3a] If notes are purchased and discounted by a bank *bona fide* before their maturity it is not affected by the cancellation of the contract for which the notes were given. Southern Insurance Co. *v.* Milligan, 154 Ky. 216, 157 S. W. 37 (1913).

[4] Pape *v.* Capitol Bank of Topeka, 20 Kans. 440. The judge quoted Bouvier's definition of Discount: "To discount signifies the act of buying a bill of exchange or promissory note for a less sum than that which upon its face is payable." The word means simply "cutting off." The purchase need not be at a certain per cent. A "lumping discount" is sufficient within the National Banking Law. Nicholson *v.* National Bank, 92 Ky. 251, 17 S. W. 627 (1891).

[5] Atlantic State Bank *v.* Savery, 18 Hun (N. Y.) 36. See Northfield National Bank *v.* Arndt, 132 Wis. 383, 112 N. W. 451.

[6] Tracy *v.* Talmage, 18 Barb. (N. Y.) 462.

(Ill.) (*f*) A note taken in the usual course of business may be deemed to have been " discounted " (within R. S. 5136) though the term " purchase " might apply to the transaction.[7] Purchase may be made by discount as well as " loan", *i.e.* the absolute title to the note may pass to the bank; if the customer assumes any responsibility, it is a loan; if he does not, it is an advance made to him in consideration of the transfer without recourse, or by delivery in case of paper payable to bearer. If the bank takes more than the law allows, it is usury in one case as in the other, but the word " purchase " properly applies.[7]

§ 73. **Negative.** — 1st. Cases denying that a bank can acquire valid title otherwise than by loan, under the power to discount.

State Bank cannot Buy because it would Nullify the Usury Laws

(*a*) In Minnesota [1] it is said, it cannot be the case that " the power to purchase and traffic in promissory notes as a species of personal property belongs to any bank as a necessary incident to its existence, or to the exercise of any of its powers as a bank of circulation and deposit alone "; and " having no corporate capacity to make the contract of purchase, the plaintiff never acquired any title to the note in suit, and the attempted act of purchase was strictly *ultra vires*, and conferred no rights whatever."

" It is conceded that plaintiff's only title to the note in question rests upon its absolute purchase, as a chose in action, from one Patterson, the then owner, for a specific sum agreed upon and paid at the time of the purchase. Patterson did not indorse the note, nor expressly assume any obligation in connection with the transfer."

" Under the act in question, the business of banking is authorized to be carried on ' by discounting bills, notes, and other evidences of debt, and by loaning money on real and personal security ' (sect. 13), and the rate of interest allowed to be charged for such discounts and loans is limited to twelve per cent taken in advance (sect. 33). The obvious intent of this legislation was to secure to the public business loans and accommodations at what was then regarded reasonable, and not exorbitant, rates of interest; and also to protect the shareholders of banks, and the banks themselves, against the risk of loss from inadequate securities, such as would likely be taken under the tempting influences of high rates of

[7] First National Bank *v.* Sherburne, 14 Ill. App. 566.

[1] § 73. Farmers & Mechanics' Bank *v.* Baldwin, 23 Minn. 201, 204.

interest, regulated only by the necessities of borrowers, and the cupidity of bank directors. If, however, as is claimed on the part of plaintiff, associations organized under this enactment possess the unlimited power of dealing in promissory notes and other evidences of debt, as property and choses in action, the same as individuals, then obviously this restriction upon the rate of interest is a practical nullity; as the bank has the power to evade it at any time by simply buying the paper instead of loaning money upon it."

National Bank cannot Buy Negotiable Paper

It has also been said,[2] generally, that purchasing or trafficking in promissory notes is not a legitimate part of the banking business, properly so called, and that a bank holding a note by purchase has no title thereto.

"The word 'negotiating' as used in this section, likewise in sect. 29 of the same statute (U. S. Rev. Stat., sect. 5136), is used in the ordinary and appropriate transitive sense, to indicate, not an act of purchase, but one of transfer, whereby the negotiated paper is passed from the holder or owner, and put into circulation.

"In the absence of any authoritative exposition of the Federal statute in this regard, the principle settled in the Farmers and Mechanics' Bank *v.* Baldwin must be regarded as decisive of the present case."

"A borrower may, as was held in Smith *v.* Exchange Bank of Pittsburg,[2a] cited by appellant, obtain the discount by a bank of the existing notes and bills of others, of which he is the holder, as well as of his own paper made directly to the bank, and the bank will thereby acquire a valid title to such paper, because it makes the purchase by discount, or through the exercise of its discounting powers. But where the acts of the parties and the circumstances surrounding the transaction clearly rebut any presumption arising from the indorsement, — and indisputably the real nature of the transaction intended by the parties to be, in the language of the court below, 'an out and out purchase of the note, and not discounting it, or lending money on the credit of it, — the mere fact of indorsement is not sufficient to warrant the court in treating the transaction as something different from what was intended."

[2] First National Bank of Rochester *v.* Pierson, 24 Minn. 141, 142.
[2a] 3 Central Law Jour. 623; s. c., 26 Ohio St. 141.

These Minnesota cases do not seem to contemplate the alternative of holding that a bank may acquire *title* by purchase as distinguished from loan, and yet that its power of purchasing, as well as its power of lending, must be exercised within the limits its organic law prescribes.

The last case is overruled in 33 Minnesota as to the point that a national bank may recover on a note taken *ultra vires* (which see).

(*b*) Though a national bank may invest its surplus capital in notes (but not its mere daily surplus), it cannot buy or acquire title otherwise than by loan; and if it does, it cannot recover on such notes.[3] Alvey, J., Bartol, C. J., and Irving, J., dissenting. As this was a very strongly argued case, we give it at some length.

Majority opinion: "The evidence shows that Winchester and Son, note and bill brokers, were employed by Lazear Brothers to sell the note of July 22, 1872, to any purchasers willing to buy, and that it was sold to the appellee, over the counter of its banking-house, at nine per cent discount, for Lazear Brothers, the drawers, who received the proceeds of sale. None of the bank officers were informed that the Winchesters were acting for Lazear Brothers, nor were the latter told to whom the note had been sold. The note was sold to the bank on the 8th day of July, 1872. The president of the bank testified that the note in question was purchased by order of the board of directors, and that he had an impression, he believed, that Lazear Brothers were to get the proceeds of it. He further proved that, after the customers of the bank were served, it sometimes invested its surplus proceeds in notes. We are of opinion that this transaction was an out and out purchase by the bank, and that such purchase was without authority, and that the bank acquired no title to the note, and cannot recover thereon in this suit. While we *do not mean that a national bank may not invest its surplus capital in notes*, we are of opinion that it has no authority to use such surplus funds, as may remain on hand from day to day, for the purpose of buying notes. National Bank of Rochester *v.* Pierson, Thompson's Bank Cases, 637; Farmers and Mechanics' Bank *v.* Baldwin, 23 Minn. 198. If any other construction were given to such a transaction as this, the intention of Congress to prohibit national banks from buying and selling

[3] Lazear Brothers *v.* National Union Bank (Md.), 12 Leg. News 64. But when the contract is executed, even if the transaction was a sale and not a discount, there may be a recovery on the note. Black *v.* First National Bank, 96 Md. 399, 54 Atl. 88 (1903).

notes would be entirely defeated, and those institutions would be at perfect liberty to decline making discounts for their customers, and afterwards to buy up the very paper which had been offered for discount and refused, at such price as the bank might choose to give. The note of the 22d of June, 1872, for five thousand dollars, was acquired by the appellee by *purchase*, without authority to make such purchase, and it is not, therefore, entitled to the note, and cannot recover upon it."

Dissent by Alvey, J.: "If Lazear Brothers had presented the paper in person, and obtained the money upon the terms upon which the brokers obtained it, there would then have been no question as to the legality of the title acquired by the bank; that, it is conceded, would have been a discount. But it is contended, and it is so held in the opinion of the majority of this court, that, as the note was obtained from Winchester and Son, bill brokers, without disclosure at the time from them that the money was for the benefit of the makers of the note, therefore it was a purchase of the note as contradistinguished from a discount, and that the transaction was *ultra vires* and consequently no title to the note was transferred to the bank. To this proposition I cannot assent.

"Now, without invoking the aid of any implied power possessed by the bank to enable it to carry on the banking business, it is expressly authorized, as we have seen, to discount and negotiate promissory notes. What, then, is the meaning of the word 'negotiate', according to its ordinary acceptation among business men? According to the most approved lexicographers, its meaning is 'to transfer, to sell, to pass, *to procure by mutual intercourse and agreement with another*, to arrange for, to settle by dealing and management.' Webster's and Worcester's Dict. This term would seem to be comprehensive enough for all the requirements of the case; but, by allowing the full meaning to the more exact and important term, 'discount', all doubt whatever would seem to be removed. To discount is to deduct a sum of money from the debt in consideration of its being paid before the usual or stipulated time for payment. In the case of Fleckner *v.* Bank of United States, 8 Wheat. 350, Judge Story, in delivering the opinion of the court, having occasion to define a discount by the bank said: 'Nothing can be clearer than that, by the language of the commercial world, and the settled practice of banks, a discount by a bank means, *ex vi termini*, a deduction or drawback made upon its advances or loans of money, upon negotiable paper, or other

evidences of debt, payable at a future day, which are transferred to the bank.'

"Purchase may be by way of discount, equally as a loan may be made by that means. When the party receiving the proceeds of the paper discounted is himself either maker or indorser, and the discount is made on his responsibility, he receives the money as a loan, for he is bound to return it; *but if he is in no way bound on the paper, he receives the money as an advance, and as a consideration for the transfer of the paper. Both transactions are, according to the established practice and usage of banks, discounts, though the latter is in effect a purchase by the bank.* The act of discounting simply has reference to the deduction from the face amount of the paper the time it has to run to maturity, and the rate of that deduction; but whether the transaction amounts to a loan or a purchase on the part of the bank, depends upon other facts and conditions of things.

"Suppose the payee of a promissory note payable to order takes it to a bank, and procures the money on it, less the rate of discount, upon indorsement without recourse; would not that be strictly a discount within the meaning of the law, notwithstanding it would not be a loan upon the responsibility of the party obtaining the money? Such a transaction would not be a loan at all, according to the correct meaning of the term; and if it be a discount, according to the modes and usages of banking, why should not any third party holding paper payable to bearer, or indorsed in blank, be able to negotiate that paper with the bank, by way of discount, and transfer a good title to the bank, notwithstanding his name might not appear upon the paper, or he incur any liability in respect to it. I cannot, I must confess, perceive the reason for the distinction that has been made in this case. It should be recollected that it is not the rate of discount with reference to which the parties deal, that determines the question of the validity of the transfer of the paper, or the title of the bank, though the latter may have exacted and received more than the lawful rate of discount. All the business of the national banks is done under the restrictions prescribed by the act of Congress; and the rate of discount is expressly prescribed among the various regulations contained in the act for the government of the banking business; and for taking, receiving, or charging any greater rate of interest or discount than is by the act allowed, the bank subjects itself to the penalties prescribed

by sect. 5198 of the Revised Statutes; but the title to the paper is not thereby affected."

2d. Cases which deny the power of purchase of negotiable paper, but use the word merely to exclude transactions not controlled by usury laws, and do not mean that a bank cannot acquire title to negotiable paper absolutely by indorsement without recourse.

(*c*) The banking law of New York authorized banks to "carry on the business of banking by discounting bills, notes, and other evidences of debt, . . . by buying and selling . . . bills of exchange", etc. It has been held, that this did not authorize a bank to *purchase* a bill or note. *The distinction became essential in connection with the point of usury.* If the bank could only *discount* bills and notes, it could not evade the statutes controlling usury. But if it could *buy* bills and notes, it could buy them at any price which might be agreed upon with the seller, and so practically evade the statute. The question therefore was, which character, that of discount or that of purchase, should be given to a completed transaction. The court gave to it the character of a discount, on the ground that the bank could discount, but could not buy, mercantile paper; *and the taint of usury was therefore held to inhere.*[4]

Power to discount notes is not power to purchase them. The right of purchasing is an entirely distinct and independent one, which may or may not be enjoyed by any bank, according to the circumstances of its particular case and the language of its incorporating act. If possessed, it is simply a right to buy the notes in the market for their fair market value, whatever that may be. It must be a *bona fide* transaction of bargain and sale. If it be colorable only, and resorted to for the purpose of covering up a usurious dealing, it will be treated as a usurious contract.[5]

§ 74. **Powers in Relation to Real Estate.** — Ordinarily, it is no part of the banking business to hold or deal in real estate.[6]

[4] All bank transactions are subject to usury laws, and are called discounts to indicate that fact, though the same transaction between individuals would be called a purchase, and be free from the taint of usury. Niagara County Bank *v.* Baker, 15 Ohio St. 68, upon authority of cases cited in the next note.

[5] See Fleckner *v.* Bank of the United States, 8 Wheat. 338, 5 L. ed. 631; Talmage *v.* Pell, 3 Seld. (N. Y.) 328; Dunkle *v.* Renick, 6 Ohio St. 524; M'Lean *v.* Lafayette Bank, 3 McLean 587; Philadelphia Loan Co. *v.* Towner, 13 Conn. 259.

[6] § 74. Under Fed. Res. Act, Sec. 24, Part II. § 192, a bank may make loans secured by improved and unincumbered farm lands. In Oklahoma

No general right to do so can be considered to be inherent in a bank. Certain obvious cases, however, in which it is eminently proper, almost even necessary, that a bank should be able to acquire, to hold, and to sell land and interest in land, will suggest themselves at once to every mind. Thus, it may often, especially in small towns, be impossible to obtain a building with the suitable appliances for security, unless the corporation can buy land and erect a structure for itself.[0a] The mortgage or conveyance of real estate to it may often be the only means by which debts owing to it can be secured or discharged.[0b] If a bank should come into possession of land in perfect good faith for either of these purposes, and should hold it or sell it only in due and *bona fide* prosecution of these objects, it seems unreasonable to imagine that the most rigorous court of justice would declare the transaction illegal. But the necessity of discussing the question of the abstract legality of such proceedings has nearly always been saved by the insertion in charters and organic laws of clauses specifically enabling banks to acquire, hold, and sell real estate for these purposes.[1] The legislative expression of this power of course excludes its exercise otherwise than in precise accordance with the statutory provisions. The holding, acquiring, or selling to any greater extent, in any

a banking corporation may not engage in real estate speculation not authorized by its charter; but where a bank has received the title to real estate and has passed it on to another in a chain of title derived from a tax sale of real estate, such fact is not sufficient to avoid the tax deed in a suit in which the bank is not a party. Jones *v.* Carnes, 17 Okla. 470, 87 Pac. 652 (1906). Banks incorporated under the law of Indiana can acquire and hold real estate for certain defined purposes (see § 3340, Burns 1908, § 2695 R. S. 1881), but they cannot hold real estate taken for debt for more than five years. Smith *v.* Stephens, 173 Ind. 564, 91 N. E. 167, 30 L. R. A. (N. S.) 704, n. (1910). In North Dakota a transaction by which a bank takes a deed of real estate for loans previously contracted and for loans made is within the statute. Merchants' State Bank *v.* Tuft, 14 N. D. 238, 103 N. W. 760, 116 Am. St. Rep. 682, n. (1909).

[0a] Where a bank erected a building twenty-two stories high, used only one fourth of the first floor for its banking business and leased the rest of the building, a tenant of the building had no right to complain and was obliged to pay his rent. Farmers' Deposit National Bank *v.* Western Pa. Fuel Co., 215 Pa. St. 115, 64 Atl. 374, 114 Am. St. Rep. 949 (1906). See also Brown *v.* Schlicer, 118 Fed. 981 (1902); Manhattan Co. *v.* Eversz, 171 Ill. App. 449.

[0b] A bank though not expressly organized to deal in real estate or authorized by statute to do so may, as an incident to its business and for the purpose of securing itself from loss in the transaction of its authorized business, become the lawful owner of that estate. State Security Bank *v.* Hoskins, 130 Iowa 339, 106 N. W. 764, 8 L. R. A. (N. S.) 376, n. (1906).

other manner, or for any other end, than is therein set forth, would be unquestionably illegal.[2] The power to purchase land, or take it in mortgage or by absolute conveyance, without the additional expression of the power to sell it or to assign the mortgage, will by necessary implication confer those powers also, and even, it has been held, the power to mortgage it.[3] And, although a national bank cannot engage in the business of buying and selling personal property, it may sell real estate lawfully acquired,[3°] and, may take personal property for it.[3a] Further, it must be regarded as appurtenant to, or even a part of, the power to take land in mortgage or pledge, that the bank should also be permitted to deal in reference to the land or interest therein, thus acquired, in any manner; as, for example, by buying in any outstanding title or interest, or in any other way whatever, that may prove desirable for rendering the security more perfect or more available.[4] The courts seem generally to have been inclined to construe the privileges of this nature conferred upon banks in a very liberal way. The foregoing cases and instances certainly do not appear to trespass beyond strict justice; but others can be added where the bounds of reasonable construction have been much more freely extended.

May Buy, Build on, and Sell Land Adjoining the Bank as a Precaution against Fire

(*a*) Thus, a bank authorized to hold as much real property as might be necessary for its immediate accommodation was held to have the right to buy up the land in the neighborhood of its banking-house, to erect fire-proof buildings thereon, and then sell these out again; the end being, of course, the greater security of its own building.[5] And a bank may enter into a contract to secure

[1] Thomaston Bank *v.* Stimpson, 21 Me. 195.

[2] Metropolitan Bank *v.* Godfrey, 23 Ill. 579.

[3] Jackson *v.* Brown, 5 Wend. (N. Y.) 590; Curtis *v.* Swartwout, 1 N. Y. Leg. Obs. 406; Roberts *v.* Washington National Bank, 11 Wash. 550, 40 Pac. 225 (1895).

[3°] The bank may warrant the title to the property which it conveys. Merchants' Bank *v.* Baird, 160 Fed. 642 (1908).

[3a] First National Bank *v.* Reno, 73 Iowa 145, 34 N. W. 796.

[4] Ingraham *v.* Speed, 30 Miss. 410; Cockrill *v.* Abeles, 86 Fed. 505 (1898).

[5] Banks *v.* Poitiaux, 3 Rand. (Va.) 136.

A bank may lease land for a term of years outstanding the life of the bank, erect a building thereon, and rent part of the building to others.

free entrance of light and air into its banking house.[5a] The case of Baird *v.* Bank of Washington [6] contains a long and interesting dissertation upon the rights which were conferred upon the bank by a clause in the act of incorporation, allowing it to hold "such lands as were *bona fide* mortgaged or conveyed to it, in satisfaction of debts previously contracted in the course of its dealings." The reasoning and language of the court will apply to a great number of similar clauses in other incorporating acts, in which language essentially identical with this is of frequent occurrence. It was declared that the right to commute debts for lands was general, and was not limited to cases where any doubt existed as to the perfect safety of the debt. The effect of the words employed was simply to prohibit colorable commutation, whereby a real purchase might be effected under a technical disguise. Provided the debt was pre-existing, and was a *bona fide* one, that is to say, not contracted originally with the purpose of being discharged by the conveyance of real estate, the conveyance would be strictly valid; although, without it, the safety of the debt must be unquestionable. The court also added, as a *semble,* that if the conveyance were made to trustees for the bank, with the intent to raise money by selling it, and not with a view to holding it permanently, neither the letter nor the spirit of the statute would be violated.

Brown *v.* Schleier, 118 Fed. 981 (1902), reported also in 112 Fed. 577 (1901), and affirmed in 194 U. S. 18, 48 L. ed. 857, 24 Sup. Ct. 558 (1904); and the lessor is not liable to creditors of the bank because it expended, in the construction of the building, more than it was authorized to do by the terms of the lease and more than it was authorized to do by statute, and, not being able to pay the taxes and rent, conveyed the building back to the lessor with no creditor objecting. Brown *v.* Schleier, *supra.* The lease is valid even though it is assignable only by the consent of the lessor. Weeks *v.* International Trust Co., 125 Fed. 370, (1903). A bank may also lease a building where it is leased so as to exchange the use of a part of it for a building suitable to its purposes, and which cannot be procured otherwise. Lechenger *v.* Merchants' National Bank, 96 S. W. 638 (Tex. Civ. App.) (1906); and an action by a stockholder against a national bank to restrain it and its directors from pulling down the bank building and erecting a six story building in its place, the most of which is to be let for offices, will not be transmuted into an action for damages against the directors, as such an action would not lie. Wingert *v.* First National Bank, 175 Fed. 739 (1910), affirmed in 223 U. S. 670, 56 L. ed. 605, 32 Sup. Ct. 391 (1912).

[5a] First Presbyterian Church *v.* National Bank, 57 N. J. L. 27, 29 Atl. 320.

[6] 11 Serg. & R. (Pa.) 411.

Only the Sovereign can Object

(*b*) Further, the opinion was expressed, on the strength of the decision in Leazure *v.* Hillegas,[7] that, even if the bank should take from a debtor real estate, which it had no right to hold, the title of the bank therein would be defeasible only at the instance of the State;[7a] that, if the title should be set aside in a process thus instituted, the land would not revert to the party granting to the bank, but would, apparently, fall into the State itself; yet that the debtor would have been fully acquitted and discharged from his indebtedness, and the loss would have to be borne wholly by the bank. This view, though properly only an *obiter dictum*, was expressed with a good deal of confidence, and apparently upon a mature consideration of the whole subject. It is certainly difficult to see why it is not sound.

(*c*) Where, by its charter, a bank was authorized to take mortgages in security for debts previously contracted, it was adjudged by Chancellor Kent, *that, if the loan and mortgage were concurrent acts*, and intended so to be, *it was not a case within the reason and spirit of the restraining clause of the statute*, which only meant to prohibit the banking company from investing their capital in real property and engaging in land speculations. "A mortgage taken

[7] 7 Serg. & R. (Pa.) 313.

[7a] Hennessy *v.* St. Paul, 54 Minn. 219, 55 N. W. 1123; Bank *v.* Flathers, 45 La. Ann. 75, 12 So. 243; Savings Bank *v.* Burns, 104 Cal. 473, 38 Pac. 102; Smith *v.* First National Bank, 45 Neb. 444, 63 N. W. 796 (1895); Hall *v.* Farmers' Bank, 145 Mo. 418, 46 S. W. 1000 (1898); National Bank *v.* Mathews, 98 U. S. 68, 25 L. ed. 190; Baker *v.* Schofield, 221 Fed. 322 (1915); Minneapolis Threshing Machine Co. *v.* Jones, 95 Minn. 127, 103 N. W. 1017 (1905); Schuyler National Bank *v.* Gadsden, 191 U. S. 451, 48 L. ed. 258, 24 Sup. Ct. 129 (1903); Schofield *v.* Baker, 212 Fed. 504 (1914); First National Bank *v.* Flath, 10 N. D. 281, 86 N. W. 867 (1901); Puget Sound National Bank *v.* Fisher, 52 Wash. 256, 100 Pac. 724 (1909); DeWitt County National Bank *v.* Mickelberry, 244 Ill. 77, 91 N. E. 86, 135 Am. St. Rep. 304 (1910) (purchase of land at foreclosure sale); Brown *v.* Schleier, 118 Fed. 981 (1902); *id.*, 112 Fed. 577 (1901), affirmed in 194 U. S. 18, 48 L. ed. 857, 24 Sup. Ct. 558 (1904) (unauthorized expenditure of money by the bank in the erection of a building on land which it had leased); Farmers' Deposit National Bank *v.* West Pa. Fuel Co., 215 Pa. St. 115, 64 Atl. 374, 114 Am. St. Rep. 949 (1906) (building erected by the bank); Jones *v.* Carnes, 17 Okla. 470, 87 Pac. 652 (1906) (purchase by a bank from a county which had bid in the property at a tax sale); State Security Bank *v.* Hoskins, 130 Iowa 339, 106 N. W. 764, 8 L. R. A. (N. S.) 376, n. (bank acquiring title to property from one who holds it in trust for defendants); Kerfoot *v.* Farmers' etc. Bank, 218 U. S. 281, 54 L. ed. 1042, 31 Sup. Ct. 14 (1910) (taking title to property to be held for the life of the grantor with remainder to his children).

to secure a loan, advanced *bona fide* as a loan, in the course, and according to the usage, of banking operations, was not, surely," says he, " within the prohibition." [8]

Kent's Reasoning Doubted

A similar decision has been made in Virginia,[9] the court quoting Kent in the Silver Lake case: " Previously contracted? how long previously? must it be a month, a week, a day, or a minute? " Of course, this is mere jugglery with words. If the legislators said " previously " they did not mean concurrent, and no such hair-splitting can prove that there is no difference between those terms. The other argument of Kent quoted above, based on the spirit of the law, is better; and still it may well be asked how we are to know what the object of a law is, except by what the legislature says, and especially how we are to know *what means the lawgivers meant to have used to accomplish their purposes* except by looking to these words; and when they have said " previously", is it complimentary to their intelligence, to say nothing of any further implication, to hold that they meant concurrent?

(*d*) A commercial bank incorporated under the California code may loan on a real estate mortgage.[10]

§ 75. **A National Bank** may deal in realty as follows (see II. §§ 28, 192): —

(1) It may buy and hold what it needs for its own use as a bank.

(2) It may take mortgage or trust deeds as security for a debt previously contracted, and may buy in the land at a judgment sale under such deed or mortgage.

(3) It may buy land sold under any judgment held by it.

(4) It may take a conveyance of land in satisfaction of previous debt.

(5) It may buy land or outstanding title, when such action is necessary to save a debt due it (and the bank is the one to exercise its discretion as to such necessity), even though the land exceeds the debt, if the security of the debt is the real object.[1]

(6) It may make loans secured by improved and unencumbered farm lands.[10]

[8] Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370.
[9] 31 Gratt. (Va.), 228.
[10] Bank *v.* Hemme Company, 105 Cal. 376, 38 Pac. 963.
[1] § 75. Upton *v.* National Bank of South Reading, 120 Mass. 153.
[10] Fed. Res. Act. Sec. 24. Part II. § 192.

It cannot hold possession of real estate more than five years, except under the first clause.

Real Security on Concurrent Loans

(*a*) Whether a national bank can take real estate security, by *mortgage* or *trust deed*, for a *concurrent* loan, is doubtful.[1a]

New York,[2] Illinois,[3] Missouri,[4] say that the national law clearly forbids a bank to take real security for concurrent or future advances.

(*b*) The United States Supreme Court in Union National Bank *v.* Matthews,[5] after saying that the implication is clear that a loan on real estate is forbidden, proceed to declare the spirit and intent of the prohibition to be the prevention of hazardous investments by the bank, the keeping of its money in the regular channels of business, and the prevention of accumulation of masses of real estate in their hands, and that the intent, not the letter, is to govern.

Trust Deed

The court further say, that, as there was only a deed of trust[5a] vesting the legal title in a third person, the bank had taken no title to land and so in any event had not violated § 5137.

These sections do not prohibit, in terms, the mortgage of real estate to a third party, to be held by the mortgagee in trust to secure a loan made by a national bank. Hence, where a loan was made upon the individual note of one partner in a firm indorsed by his copartner, and the maker mortgaged real estate to secure the indorser, with the agreement that in case of default the security should inure to the benefit of the bank, it was held that the transaction was valid, and that the bank could, by proceedings in equity, reach and avail itself of the security.[6]

[1a] A national bank has authority to take an assignment of a note and mortgage upon real estate for money loaned the mortgagee. First National Bank *v.* Andrews, 7 Wash. 261, 34 Pac. 913 (1893). But see First National Bank *v.* Flath, 10 N. D. 281, 86 N. W. 867 (1901).

[2] Crocker *v.* Whitney, 71 N. Y. 161.

[3] Fridley *v.* Bowen, 87 Ill. 151.

[4] Matthews *v.* Skinner, 62 Mo. 329.

[5] 98 U. S. 621, 25 L. ed. 188. See § 754, *ultra vires*.

[5a] When the conveyance is taken in trust to be conveyed upon the direction of the grantor the title is not void, but only voidable. Kerfoot *v.* Farmers' etc. Bank, 218 U. S. 281, 54 L. ed. 1042, 31 Sup. Ct. 14 (1910); Miller *v.* King, 223 U. S. 505, 56 L. ed. 528, 32 Sup. Ct. 243 (1912).

[6] First National Bank *v.* Haire, 36 Iowa 443.

The result seems to be, that a conveyance which carries the legal title to the bank, if for a concurrent loan or future advances, is unlawful; but a trust deed or mortgage giving legal title to a *third person for the benefit of the bank and as security for such loan, is lawful.*[6a]

Effect of Ultra Vires. Only Sovereign can Object

(*c*) One thing the Matthews case did make perfectly clear, viz. that whether right or wrong, if a national bank takes real estate by mortgage, trust deed, or conveyance absolute, no one but the United States in the person of the comptroller can object; the transaction is perfectly good and enforceable between the parties.[6b]

A number of State cases had ruled otherwise on this point, but these decisions are now fossils, buried deep under this recent deposit, but as they may be interesting in connection with State statutes, I will keep some of those I have dug up, and arrange them for exhibition in a sort of museum note in Part II.

(*d*) M. obtained a loan from a national bank on short time paper, and deposited as security a note of W. secured by mortgage; the bank had the note of M. and other personal security.

The court said a national bank could lend only on personal security, but if the debtor makes default, or at any time *after* the loan is actually made, the bank may take real security unless so *soon* after as to indicate that the transaction was only colorable, and " really a part of the original understanding."

But in this case the personal security was ample at the time, and the loan was therefore on personal security, and not within the prohibition, though a mortgage was also taken; and if

[6a] In National Bank *v.* Thomas, 30 R. I. 294, 74 Atl. 1092 (1910), the court says that although a national bank may not loan money upon real estate security given directly to the bank, real estate owned by the borrower may be used in various indirect ways for the purpose of giving security to the bank.

[6b] See First National Bank *v.* Flath, 10 N. D. 281, 86 N. W. 867 (1901); First National Bank *v.* Messner, 25 N. D. 263, 141 N. W. 999 (1913); National Bank *v.* Thomas, 30 R. I. 294, 74 Atl. 1092 (1910); Puget Sound National Bank *v.* Fisher, 52 Wash. 246, 100 Pac. 724 (1909). If a savings bank takes an assignment of a mortgage solely in the interests of the bank it cannot be assailed because it was by statute prohibited from taking such assignment or prohibited under its chartered powers from binding itself by the accompanying agreement. Gerrity *v.* Wareham Savings Bank, 202 Mass. 214, 88 N. E. 1084 (1909).

the personal security becomes insufficient, and the borrower is insolvent, the bank can maintain a bill to foreclose the mortgage.[7]

True, the loan was on personal security, and therefore good. But as § 5137 forbids taking a mortgage for any other purpose than to secure a *previous* debt, as between the United States and the bank taking the mortgage, it could hardly be sustained as proper.

The Note may be Concurrent if the Debt is Previous

(*e*) And where an indebtedness already existed, and an arrangement was made whereby, in payment of this and to secure the bank against loss, a new note secured by a mortgage was executed, it was held that such new note and mortgage were valid, as being taken in pursuance of the power of the bank to adopt reasonable and necessary measures for the collection and security of debts; a power necessarily incident to the power of banking.[8]

§ 76. **Bank as Trustee of Realty.** — In this country the general or common law rule is, that corporations may be seised of lands, and hold other property in trust, for purposes not foreign to their institution.[1]

In many States there are statutory provisions upon this matter.

(*a*) In New York there is an act concerning money corporations, which decides that no conveyance, assignment, or transfer of any effects for the benefit, use, or security of any such corporation shall be valid, unless made directly to the corporation. This refers to moneyed corporations chartered by the legislature of that State, and has no application to foreign corporations. And if land be conveyed in trust for the benefit of a foreign corporation, the corporation, under the provisions of another act, will only incur the penalty of not being able to maintain an action on the deed; but the conveyance, for all other purposes, will be good.[2]

[7] Merchants' National Bank of Chicago *v.* Mears, 8 Bissell 158 (1878).
[8] Shinkle *v.* First National Bank of Ripley, 22 Ohio St. 516.
[1] § 76. 2 Kent, Com. 226. See First Parish in Sutton *v.* Cole, 3 Pick. (Mass.) 237–239, 249; M'Girr *v.* Aaron, 1 Penn. (Pa.) 49; Greene *v.* Dennis, 6 Conn. 304; Theological Seminary of Auburn *v.* Cole, 18 Barb. (N. Y.) 360.
[2] Wright *v.* Douglass, 10 Barb. (N. Y.) 97.

Story

(*b*) Justice Story, in Vidal *v.* The Mayor,[3] said there was no objection to a corporation taking realty in trust for a purpose not strictly within the scope of its direct objects, as for the benefit of a stranger or another corporation.

Kent

(*c*) Kent says corporations have no powers not given them, and therefore cannot be trustees in a matter where they have no interest.

But if property is granted or devised to them partly for their use and partly for the use of others, they can execute the latter trust as a necessary incident to the former.[4]

It is pretty well agreed that only the State can object to the corporation's right to take land in trust.[5]

§ 77. **Cases upon the Power of Banks in Relation to Stocks.** — See § 59.

A national bank cannot buy its own stock, and no title passes to it,[1] although, in Wallace *v.* Hood,[1a] it was held that stock so purchased was not void.

Where a bank buys its own stock to protect itself from loss [1b] it may sell the same on credit, and take the buyer's note as collateral security. The buyer, if already a stockholder, cannot avoid the sale on the ground of false representations made to him by the officers of the bank as to its stock and condition.[2]

A bank cannot speculate [2a] or traffic either in financial securities

[3] Vidal *v.* Mayor, 2 How. 128, 11 L. ed. 205.

[4] *In re* Howe, 1 Paige (N. Y.) 214.

[5] Wade *v.* American Col. Soc., 7 Smedes & M. (Miss.) 697.

[1] § 77. Meyers *v.* Valley National Bank, 18 National Bankruptcy Register 34; Green *v.* Ashe, 130 Tenn. 615, 172 S. W. 293 (1914); United Securities Co. *v.* Ostenberg, 60 Colo. 249, 152 Pac. 1163 (1915); Maryland Trust Co. *v.* National Mechanics' Bank, 102 Md. 608, 63 Atl. 70 (1906).

In Georgia a bank is prohibited from using any part of its capital stock to purchase its own shares. Civ. code, 1895, § 1965. See Fitzpatrick *v.* McGregor, 133 Ga. 332, 65 S. E. 859, 25 L. R. A. (N. S.) 50, n. (1909).

[1a] 89 Fed. 11 (1898).

[1b] A national bank may accept a pledge of its own stock to secure a loan. First National Bank *v.* Lanz, 202 Fed. 117 (1913).

[2] Union National Bank *v.* Hunt, 7 Mo. App. 42.

[2a] A national bank cannot take stock in a new speculative corporation with the double liability attached in satisfaction of a debt. First National

or in merchandise.[2b] It has been held not to be incidental to the banking business, nor an implied power pertaining to a bank, to buy or sell stock or bonds.[3] But it may take and hold them as collateral security,[3a] and, in case of their loss, will be liable only as an ordinary bailee; that is, if there has been an absence of proper and sufficient care on its part.[4] The measure of damages will be the value of the bonds at the time of the loss.[5] A bank need not be prohibited by its organic law from engaging in such traffic. For it owes its powers as it owes its existence to the terms of that charter or law. It is not restricted like an individual from the exercise of a wide range of other powers, which, in the absence of restriction, it would enjoy; but its power to do any act at all is due wholly to the legislation of which it is a creature, and must be either the direct or necessarily incidental gift of that legislation. When, therefore, it is specifically permitted to conduct a banking business, it has no power to do any other species of business; not because it has been stripped in any manner of that power, but because that power has never attached to it. A bank may however do, on isolated and especial occasions, or for certain purposes, what it cannot do generally, and for all purposes. It cannot buy and sell merchandise, but it can take merchandise

Bank *v.* Converse, 200 U. S. 425, 50 L. ed. 537, 26 Sup. Ct. 306 (1906); *a fortiori*, it cannot take shares in a partnership to the same end. Merchants' National Bank *v.* Wehrmann, 202 U. S. 295, 50 L. ed. 1036, 26 Sup. Ct. 613 (1906). The purchase of national bank shares by a national bank for speculation is *ultra vires*. Metropolitan Trust Co. *v.* McKinnon, 172 Fed. 846 (1909).

[2b] National banks have no power whatever to deal in merchandise of any kind, or in stocks or bonds. Leonhardt *v.* Small, 117 Tenn. 153, 96 S. W. 1051, 119 Am. St. Rep. 994, 6 L. R. A. (N. S.) 887 (1906). See Farmers' Bank *v.* St. Louis etc. Ry. Co., 119 Mo. App. 1, 95 S. W. 286 (1906).

[3] First National Bank of Charlotte *v.* National Exchange Bank of Baltimore, 39 Md. 600; Weckler *v.* First National Bank, 42 Md. 581; Logan Bank *v.* Townsend, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. 496 (1891); McBoyle *v.* Union National Bank, 162 Cal. 277, 122 Pac. 458 (1912); Hotchkin *v.* Third National Bank, 219 Mass. 234, 106 N. E. 974 (1914).

[3a] Fulton *v.* National Bank, 26 Tex. Civ. App. 115, 62 S. W. 84 (1901). And by the enforcement of its right as pledgee it may become the owner of such stock; or, at least, it is entitled to hold them against the administrator of the pledgor, so long as its claim is unsatisfied, and in the meantime may receive and enforce dividends or other benefits attached thereto. Corn Exchange National Bank *v.* Kaiser, 160 Wis. 199, 151 N. W. 259 (1915).

[4] Third National Bank of Baltimore *v.* Boyd, 44 Md. 47.

[5] *Ibid.*

from a debtor, if this is the only way to save the amount of the debt; and of course, having taken property of any nature for this proper purpose, it may sell it in any manner that will bring the best price. It may purchase public stocks in order to deposit them, under a law requiring such stocks to be deposited as a security for circulation; or in order to invest its surplus funds in them; it may loan upon them as security, and sell them if need be to save the debt. But it cannot "*traffic*" in them; it cannot buy them with the view to sell them shortly at an anticipated advanced price. Such would not fall within any department of the general province of banking, which alone the association can carry on, and which it must carry on only in the manner, with the powers, and for the objects directly set forth or necessarily implied in the law of the corporate existence.[6]

In a case in Vermont, indeed, it was once said that a clause in a bank charter prohibiting the bank from dealing in any goods, wares, merchandise, or commodities, was in derogation of the common and ordinary powers of the corporation. The full breadth of this language would certainly set the doctrine of the case at variance with the views expressed above. But the reasoning in support of those views is too clear, and the authorities are too strong, to be brought within the range of doubt by this solitary adjudication; more especially since the sweeping statement of the legal theory in that opinion was enunciated for the insignificant purpose of protecting the bank in a purchase of shares in its own capital stock, a proceeding which could have been defended at much less expense of questionable generalization.[7] See § 59.

(*a*) A national bank cannot engage in selling railroad or mortgage[7a] bonds on commission. In Maryland[8] the court say: —

"*To the usual attributes of Banking, consisting of the right to issue notes for circulation, to discount commercial paper, and to receive deposits, this law adds the special power to buy and sell exchange, coin, and bullion;* but we look in vain for any grant of power to

[6] Comstock *v.* Willoughby, Hill & Den. (N. Y.) 271; Talmage *v.* Pell, 3 Seld. (N. Y.) 328; Leavitt *v.* Yates, 4 Edw. Ch. (N. Y.) 134; Sackett's Harbor Bank *v.* President of Lewis County Bank, 11 Barb. (N. Y.) 213; Portland Bank *v.* Storer, 7 Mass. 433; Weckler *v.* First National Bank of Hagerstown, 42 Md. 581. See also Curtis *v.* Leavitt, 15 N. Y. 9, which, properly interpreted, supports the above doctrine.

[7] Farmers & Mechanics' Bank *v.* Champlain Trans. Co., 18 Vt. 131.

[7a] Farmers' National Bank *v.* Smith, 77 Fed. 129 (1896).

engage in the business charged in this declaration. It is not embraced in the power to '*discount and negotiate*' promissory notes, *drafts, bills of exchange, and other evidences of debt.* The ordinary meaning of the term '*to discount*' is to take interest in advance, and in banking it is a mode of loaning money. It is the advance of money not due until some future period, less the interest which would be due thereon when payable. The power '*to negotiate*' a bill or note is the power to indorse and deliver it to another, so that the right of action thereon shall pass to the indorsee or holder. No construction can be given to these terms, as used in this statute, so broad as to comprehend the authority to sell bonds for third parties on commission, or to engage in business of that character. The appropriate place for the grant of such a power would be in the clause conferring authority to 'buy and sell'; but we find that limited to specific things, among which bonds are not mentioned, and upon the maxim, *Expressio unius est exclusio alterius*, and in view of the rule of interpretation of corporate powers before stated, the carrying on of such a business is prohibited to these associations." [8]

Dealing in stocks is not distinctly prohibited by the act, but such prohibition is implied from a failure to grant the power. Yet, in adjusting a *contested claim*, the bank may pay more than its value, so as to obtain stocks in an honest effort to avoid loss; and then it may sell such stock in the market. Such transactions do not amount to a dealing in stocks.[8a] Subject to the restrictions of the act, the bank can do what a natural person may lawfully do.[9]

A national bank is not by its charter, nor by its statutory nor its incidental powers, authorized to act as broker or agent in the purchase of bonds or stocks.[10]

(*b*) In the honest exercise of the power to compromise a doubt-

[8] Weckler *v.* First National Bank, 42 Md. 581.

[8a] McBoyle *v.* Union National Bank, 162 Cal. 277, 122 Pac. 458 (1912).

[9] First National Bank of Charlotte *v.* National Exchange Bank, 2 Otto 122, 23 L. ed. 679.

[10] First National Bank of Allentown *v.* Hoch, 7 Weekly Notes of Cas. (Penn.) 298; Hotchkin *v.* Third National Bank, 219 Mass. 234, 106 N. E. 974 (1914).

But if it authorizes its cashier to buy and sell stocks for cash and on margin and he does so and makes large profits on the cash transactions the bank cannot, after the cashier has absconded, claim that it is not liable for the losses on the margin transaction. National Bank *v.* Fridenberg, 206 Pa. St. 243, 55 Atl. 960 (1903).

ful debt owing to the bank, *it can hardly be doubted that railway stocks may be* accepted in *payment and satisfaction,* with a view to their subsequent sale and conversion into money, so as to make good or reduce the anticipated loss.[11]

The power to buy or sell stocks of other corporations by a national bank, for its own use, is nowhere delegated to it, nor is it an incident of banking business,[11a] except as stocks are taken as security for a debt. A national bank holding stocks as security may, for its own protection, on a foreclosure for default in payment of the debt, become the purchaser to prevent loss.[12]

The directors of a savings bank may, in order to secure a debt due from an insolvent debtor, take from him shares of stock in another corporation in settlement of his liability.[13] A solvent bank may purchase its own stock in payment of a previously existing debt due from a stockholder.[14]

§ 78. **Saving Debt.** — See §§ 60, 77 *b.*

A Georgia bank,[1] to secure a claim, levied on the Stonewall Iron Works, and B., the manager of said works, told the bank that, if he could work off the raw material on hand, convert it into pig iron, and sell it, the debt due the bank could be paid, but he must have supplies to do this. The bank thereupon furnished the means to carry on this business, and the court held its action *intra vires.*

[11] First National Bank of Charlotte *v.* National Exchange Bank, 51 How. Pr. (N. Y.) 320.

[11a] See Barron *v.* McKinnon, 196 Fed. 933 (1912); Metropolitan Trust Co. *v.* McKinnon, 172 Fed. 846 (1909); Shaw *v.* National German-American Bank, 132 Fed. 658 (1904); First National Bank *v.* Converse, 200 U. S. 425, 50 L. ed. 537, 26 Sup. Ct. 306 (1906); Merchants' National Bank *v.* Wehrmann, 202 U. S. 295, 50 L. ed. 1036, 26 Sup. Ct. 613 (1906); Hotchkin *v.* Third National Bank, 219 Mass. 234, 106 N. E. 974 (1914); Boyertown National Bank *v.* Fridenberg, 206 Pa. St. 243, 55 Atl. 960 (1903); Fourth National Bank *v.* Stahlman, 132 Tenn. 367, 178 S. W. 942 (1915).

A national bank may acquire and hold stock in a building corporation as part of a transaction for renting desirable banking quarters, if it uses good faith in the transaction. Fourth National Bank *v.* Stahlman, 132 Tenn. 367, 178 S. W. 942 (1915).

[12] Burley *v.* Bowen, quoted in Ball on National Banks, pp. 54, 110. See also Wood *v.* Green, 131 Tenn. 583, 175 S. W. 1139 (1915), citing many cases.

It then becomes subject to the same liability as any other shareholder. Hotchkin *v.* Third National Bank, 219 Mass. 234, 106 N. E. 974 (1914); Hill *v.* Shilling, 69 Neb. 152, 95 N. W. 24 (1903).

[13] Hill *v.* Shilling, 65 Neb. 152, 95 N. W. 24 (1903).

[14] Draper *v.* Blackwell, 138 Ala. 182, 35 So. 110 (1903).

[1] § 78. Reynolds, assignee, *v.* Simpson & Ledbetter, 74 Ga. 474.

"When a banking corporation acquires possession of property, either by a lien thereon, or by the purchase of the same for the payment of a debt due to it, and expends money on it, or furnishes supplies either for its preservation or to carry on the business in which such property is employed, with a view to rendering it productive, in order to satisfy the debt the bank holds against the former owner of the property, it is not chargeable with exceeding its corporate powers by engaging in a business beyond the scope and purpose of its creation.

"Whether the bank used its power of collecting its debt as a pretext for embarking in a business foreign to that for which it was created, and which it was authorized to conduct, or whether it made a proper use of it in furtherance of its legitimate business, was fairly submitted to the jury, and their verdict is upheld by the evidence." [1]

A national bank lawfully holding a mortgage on real estate may, to protect its interests, purchase a prior mortgage on the same real estate.[2]

Under the United States Revised Statutes, § 5137, a national bank may purchase at sheriff's sale land mortgaged to it in good faith, as security for a debt previously contracted.[3] Under Michigan statute a bank may foreclose a mortgage by advertisement.[3a]

It was agreed between the maker and the accommodation indorser of a promissory note, that it should be "used" only at a certain bank. The bank, having knowledge of the agreement, allowed the maker from time to time to draw money, holding the note as collateral security. Held, that the bank might sell its claim against the maker, and transfer the note to the purchaser as collateral.[4]

Bank may Cut and Sell Timber, or Agree to Get Release of Mortgage

A national bank that has loaned money on timber land may, to save itself, buy in the land at foreclosure sale, and cut and sell the timber.[5]

[2] Holmes *v.* Boyd, 90 Ind. 332.
[3] Heath *v.* Second National Bank, 70 Ind. 107.
[3a] 1 How. Stat. (Mich.) § 3142; 3 How. Stat. (Mich.) § 3208 b; Gage *v.* Sanborn, 106 Mich. 269, 64 N. W. 32.
[4] Proctor *v.* Whitcomb, 137 Mass. 303.
[5] Roebling *v.* First National Bank, 30 Fed. 744.

An agreement by a bank to procure the release of a mortgage held by a third person on lands upon which the bank also holds a mortgage, if made to save the debt due the bank, is not *ultra vires*.[6]

A mortgage, given to a bank by its president to secure a loan made by him contrary to the statute, is not invalid, if its object is to restore the money thus illegally loaned.[7]

A bank though not authorized, either expressly or by statute, to deal in real estate, may acquire and hold land for the purpose of securing itself from loss in the transaction of its authorized business.[7a]

When a deed is given to a bank for loans previously contracted and for loans made the transaction is within the statute.[8]

Banks which hold a trust deed of a mining company may purchase the property so as to protect their interest and realize on their security.[9]

A national bank may become the owner of shares in a partnership. It cannot, however, become a partner or incur partnership liabilities.[10]

Whether or not a national bank may engage in the creamery business in order to save itself is not fully decided, but the court intimates that it could do so;[11] also it is undecided whether or not a national bank may complete a building contract when the contractor dies insolvent.[12]

A bank is liable for debts incurred while attempting to carry out the contract of its debtor, for the purpose of collecting a debt due it.[13]

[6] McCraith *v.* National Mohawk Valley Bank, 104 N. Y. 414, 10 N. E. 862 (1887).

[7] Dunn *v.* O'Connor, 25 App. Div. (Hun, N. Y.) 73 (1898).

[7a] State Security Bank *v.* Hoskins, 130 Iowa 339, 106 N. W. 764, 8 L. R. A. (N. S.) 376 (1906).

[8] North Dakota Rev. Code, 1899, sec 3230; Merchants' State Bank *v.* Tufts, 14 N. D. 238, 103 N. W. 760, 116 Am. St. Rep. 682, n. (1905).

[9] Missouri State Bank *v.* South St. Louis Foundry, 145 Mo. App. 257, 129 S. W. 433 (1910).

[10] Merchants' National Bank *v.* Wehrmann, 69 Ohio St. 160, 68 N. E. 1004 (1903).

[11] Emigh *v.* Earling, 134 Wis. 565, 115 N. W. 128, 27 L. R. A. (N. S.) 243, n. (1908).

[12] Security National Bank *v.* St. Croix Power Co., 117 Wis. 211, 94 N. W. 74 (1903).

[13] Swanee National Bank *v.* Purcell Grocery Co., 34 Okla. 34, 124 Pac. 603, 41 L. R. A. (N. S.) 494 (1912).

CHAPTER VIII

OFFICERS AND AGENTS. — GENERAL PRINCIPLES

§ 80. The principles of estoppel, ratification, intent of parties to contract, "*qui facit per alium*", etc., and the rules of agency in general, are what we have to keep in mind.

§ 81. The fourth question as to banking business, "How?"

(*a*) What the stockholders must do.

(*b*) What the stockholders may do.

§ 82. When agents are necessary; the questions arising from their employment; and the facts precedent and subsequent to be considered.

When the Agent's Act is that of the Bank.

§ 83. As between the bank and the agent.

§ 84. As between the bank and its sovereign.

§ 85. As between the bank and a surety on the bond of an officer of the bank.

§ 86. As between the bank and third persons generally.

Contractual Acts in General.

§ 87. May not bind either bank or agent.

§ 88. But one or both may be liable on the facts.

(*a*) Account for benefit.

(*b*) Agent liable in case.

§ 89. When third person may hold bank (general rules).

(*a*) *Ultra vires* acts, two classes of cases.

§§ 90, 91. When bank can hold third party (general rules).

(*a*) Ratification.

(*b*) *Ultra vires.*

§ 92. When the agent holds third party (general rules).

Contractual Acts. — Intent of Parties.

§ 93. Exclusive credit to agent.

§ 94. Exclusive credit to bank.

When agent contracts in his own name as agent, but fails to sustain his authority.

§ 95. Concurrent credit.

(*a*) Presumption when agent contracts in his own name. § 144 *c.*

(*b*) When agent does not disclose his principal.

(*c*) Note payable to cashier may be sued on by the bank.

(*d*) Land bought for bank by president in his own name.

§ 96. Contractual Acts. — Authority of Agent.

§ 97. Actual authority by organic law, vote, usage, verbal order of superior, and tacit approval, or by necessity. See § 165.

§ 98. Inferred or apparent authority. See 98 (*i*), (*c*), (*l*), (*n*); §§ 114, 142, 151, 153, 165*c*, *d*, 174 *a*.

(*a*) Course of action by an officer without objection from bank. See § 171 *g*.

(*b*) Legal and proper appointment inferred.
De facto officers.

(*c*) Inherent powers inferred from occupancy of office. See § 171, *d*, *e*.

Expansion of § 98.

(*d*) Test question, — Would a prudent man suppose the officer had authority, judging from the conduct of the bank, as known to him, actually or constructively?

(*h*) Third party has notice if he knows a fact which would lead a man of ordinary prudence to an inquiry which would disclose the truth.

(*i*) Authority cannot be inferred beyond what could legally be given by the power whose conduct is the basis of inference.

(*f*) *Ultra vires* acts may bind.

(*g*) Bank may restrict or enlarge inherent powers, but not to affect parties without notice.

(*j*) Substitution of one officer for another.
Receipt of money by paying teller.

(*k*) Representations. § 103.
Notice to agent. § 104.

(*l*) Holding out by usage.
Opinion of U. S. S. C.

(*l–n*)
- Bank may be bound to innocent party, even though the officer acts fraudulently or *ultra vires*.
- Acts within the ordinary scope of an office bind the bank in favor of an innocent third party, though the *charter* limits the officer's powers unknown to such party. § 98 *f*.

§ 99. Contractual Acts. — Adverse Interest of Agent. §§ 109, 125, *b*, *e*, 136, 167 *e*.

§ 100. Revocation.

§ 101. Ratification.

(*a*) Constructive knowledge of facts not enough.

(*b*) Ratification by stockholders.

(*c*) Retention of proceeds ratifies.

(*d*) Directors' approval or acquiescence. §§ 25 *a*, 168 *g*.

§ 102. Tortious Acts in General.
Agent's responsibility to bank. §§ 128, 147, 172.

(*a*) Agent's responsibility to third party. §§ 128, 147, 172, 717.

(*b*) Bank's responsibility to an agent.
Bank's responsibility to sovereign. § 722.

(*c*) Bank's responsibility to third person.
Grounds of liability in tort; authorization, ratification, control, or, in some cases, the fact of being in the best position to prevent.
General rule of bank's liability.
Ultra vires tort. § 727 *f*.

Wilfulness not the test; bank liable for tort in course of business, even though contrary to express directions.

(*d*) Statement of the law by U. S. S. C.

Bank's responsibility for correspondent or notary. § 264.

(*e*) Cases on the bank's liability for *negligence*. § 9, n. 16: §§ 264, 430, 461, 482 *e*, 761.

(*e*) and (*h*) Tort beyond officer's scope; cask of gold. §§ 201, 202.

(*f*) Banks do not warrant the general honesty of officers.

(*g*) Negligence of directors in selecting officer.

Bank not responsible for remote result, felony intervening, case of stolen bills. § 658.

§ 103. Representations. § 42 *c*, 2, §§ 124, 145, 167, 168, 203.

General rule. May amount to fraud, warranty, or contract. § 167.

Information as to past transactions is courtesy, unless it bears on present or future dealings. § 167 *c*. See also *b*.

(*a*) When an agent's power is ascertained, a third person may take his representations as to any extrinsic fact peculiarly within the agent's knowledge, and not ascertainable by a comparison of the act done with the terms of the agent's power, and pertaining to the business for which the agent has actual or implied authority. What representations shall be considered as so pertaining to the duty of an agent is much controlled by usage. An agent's representations can never be taken to prove his own authority.

(*c*) Falsehood told by one officer to another.

(*d*) Teller's assertion that an indorsement is genuine.

(*e*) Representations in agent's own business, as known to party with whom he is dealing, will not affect the bank.

§ 104. Notice to the Bank. § 9, n. 9; §§ 133, 146, 166.

Grounds of decision, communication, and identity.

§ 105. Credibility.

§ 106. Adverse interest.

§ 107. Special duty to receive such notice.

§ 108. Did the agent *act* for the Bank in the matter?

If so, did the information come during such action, *or previously;*

(*a*) and if the latter, then how long before, and was there an

(*e*) (*g*) adverse interest, and did the third party know of the agent's having notice, and not of his adverse interest.

§ 110. Ratification adopts an act with all the agent's notice, previous or contemporaneous. §§ 101, 168 *g*.

§ 111. When notice to agent does not affect the bank.

§ 112. Notice to a single director.

Question as to the justice of holding bank.

(*a*) Louisiana court favors requiring notice to a majority, or to the board.

(*b*) Conclusion upon the argument.

§ 113. A note on the competency of bank officers as witnesses for the bank.

§ 98 *b*. De facto Officers.

§ 80. Except by way of illustration, it would be superfluous to cite cases upon the maxim, *Qui facit per alium facit per se*, or the principles of estoppel and ratification, and that the essence of a contract is the intent of the parties, which underlie a great part of this chapter, or those familiar propositions which flow from these axioms, and are assumed as the basis of decision throughout the country.

The Law of Agency Supplies the Rules of This Division

The business of an incorporated bank [1] can of course be conducted only by agents [1a] of the corporation, or, as they are commonly styled, officers of the bank. It is in the corporate shape that nearly all the banking business in the United States is carried on; though the English system, by which private individuals and partnerships enter into the banking business, is by no means unknown among us. Even in this latter species of arrangement, however, the individual or partnership, if the business be tolerably large, must appoint clerks or agents, who must perform the functions, and may often assume the titles, of certain of the bank officers, — not of president or directors, of course, but of cashier, teller, bookkeeper, and the like. In either case, the official or clerk is in fact strictly the agent of the corporation, partnership, or individual; and in general terms it may be stated that the ordinary rules of the law of agency will apply for the settlement of all appropriate questions. These rules will govern all transactions in which the corporation or its officials are parties, just as much as they govern all transactions in which the individual and his clerk are parties. It makes no difference that the principal

[1] § 80. The "associations" of New York, organized under the statutes of that State, differ only in some slight and insignificant particulars from ordinary corporations. For all the purposes of the matters now under discussion, they may be regarded as corporations. The National Banking Act, § 8, especially declares that all organizations under its provisions, though called "associations", shall yet have the legal character of corporations.

[1a] An employee of the bank engaged in perpetration of a fraud upon the depositor is not an agent of the bank. Brown *v.* Lynchburg National Bank, 109 Va. 530, 64 S. E. 950 (1909); neither is a bank examiner the agent of a bank to agree that a part of a fund deposited with the bank by its president to secure his indebtedness shall be applied to a debt due the bank by a customer, and for which the president of the bank was ultimately liable. Culpeper National Bank *v.* Walter, 114 Va. 522, 77 S. E. 484 (1913).

is a corporate body, and that the agent has an official designation. His title serves only to show in what class of dealings, for what purposes, and with what powers, he is accredited as an agent; and the simple legal relationship of principal and agent, as it is well understood in its constant occurrence between individuals, is to be found with precisely the same legal attributes beneath the corporate impersonality and the official dignity.[2]

§ 81. The fourth question concerning banking business was, "How?" And in considering the manner in which it is done, the chief fact calling upon our attention is that nearly the whole of it must by the nature of the case be carried on through agents.

What the Stockholders Must Do and May Do

(*a*) Some acts may be, some must be, done by the body of stockholders; for example, the election or removal of directors, the increase of capital, a voluntary dissolution, or abandonment, or any act involving a change in the organization of the bank, must be done by the stockholders; and any transaction infringing on the private rights of stockholders, as a gift of the bank's property, or a call upon the shareholders, requires, in the absence of statutory provisoin, the consent of every one of the stockholders to make it completely valid.

(*b*) Besides these things, which *must* be attended to by the corporate body itself, there are many others which may or may not belong to its sphere of action, according to its charter or the statute under which it is organized, and the action of the corporation itself in the disposal of its powers. For example, the power of making by-laws may be in the body of stockholders, or in the board of directors (II. § 8); and even where the whole power of management and of making by-laws resides in the directors, the stockholders may be called upon by them for advice and instructions.

[2] Frankfort Bank *v.* Johnson, 24 Me. 490; Atlantic Bank *v.* Merchants' Bank, 10 Gray (Mass.) 532.

A national bank has power under the banking laws of the United States to intrust to its agent such authority as is required to perform all of the legitimate demands of its authorized business, and to enable it to conduct its affairs within the general scope of its charter, safely and prudently. Ricker National Bank *v.* Stone, 21 Okla. 833, 97 Pac. 577 (1908).

Necessity of Agents and the Consequent Questions. Precedent and Subsequent Facts

§ 82. However, no such unwieldy body as that of the shareholders could ever receive deposits, certify checks, collect debts, or do any of the acts that make up the daily routine of business. Agents are necessary, and their introduction upon the scene of action gives rise to complicated and important questions. What liabilities exist between the officer and the bank? When is the act of the agent the act of the bank? When is the individual agent responsible to the third party? The problem resembles that of the three bodies in astronomy, and is one of the most interesting in legal dynamics. Many facts have to be considered in seeking a solution. The agent (A.) may or may not have actual authority from the bank (B.) or from the board to perform the act on behalf of the bank. The third party (C.) may know A. is acting for B., or not. B.'s conduct may be such as to lead C. naturally to infer that A. acts with its approval. A. may make representations, or have certain knowledge, during and affecting the transaction. C. may have notice of restrictions on A.'s power, or of other facts bearing on the matter, or he may give exclusive credit to A. The act may be *intra vires* of the bank, or *ultra vires*, and C. may or may not have notice of this. A. may *know* he is going beyond his authority, or on the facts as known to him his act may be within bounds, and yet some fact out of sight make it really wrongful. An agent's action may be subsequently approved by the bank or the board of directors, or they may take the benefit of it and make no objection, or retain A. in their service after knowing of his wrong conduct.

§ 83. The question of greatest import in the matter before us is, Where is the boundary between individual and corporate responsibility? when is the agent's act that of the bank, and when is it merely his private affair?

Bank v. *Officer*

As between the bank and the officer his act is the bank's only when it is done with the bank's own consent or approval, or is ratified by it with a knowledge of the facts, or when it is done by authority or approval of a superior officer, the subordinate having no notice of any fact making the order of the superior wrongful,

or when it is ratified by a superior officer who could lawfully have authorized it. Otherwise as between the bank and the agent, the latter is responsible for all loss directly resulting from his conduct in the business of the bank, which fails to come up to the standard of reasonable skill and competency, ordinary care and attention to the duties of his office, strict obedience to the law on the facts reasonably within his knowledge, and a course of conduct unstained by any bad faith.

The right of action of the bank against an officer for his wrongful or fraudulent act seems not to be barred by the Statute of Limitations, if his act has only been known to himself during the period. It is his duty to disclose the fact to the bank, not the duty of the other officers to inquire of him. Thus, where the president of a bank receives money of the bank, to be applied in payment of a specific debt, but does not so apply it, and the bank remains in ignorance of the fact until it is subsequently compelled to pay to the creditor, the president cannot, when sued by the bank, set up the Statute of Limitations in his defence.[1]

Bank v. *Sovereign*

§ 84. As between the bank and the State, there is, by the nature of their duties, a wide difference between the acts of the board and those of any other agent. If the former does any act in the management of the bank's business or its property which, upon facts known to them or which might be known by the exercise of reasonable diligence, is a violation of the law under which the bank is organized, it is the act of the bank, and however innocent the stockholders may be, may cause a forfeiture; they have intrusted the management to the directors, and must abide the result. (See Forfeiture.)

The directors are the real brain and judgment and control of the bank, and for the protection of the public their action must be deemed that of the bank, so far as its business and property are concerned; otherwise the bank could defy forfeiture, and violate the law with impunity, by a continual change of officers.

But if any subordinate officer breaks the law, the question is, Did the bank or the board authorize the act, or knowingly permit it or adopt it, by retaining the wrongdoer or the benefit of the transaction knowing the facts? If so, the bank is liable to for-

[1] § 83. Atlantic National Bank *v.* Harris, 118 Mass. 147.

feiture on the reasoning above. When, however, the act was unauthorized, and the directors have exercised due care in supervision, and when the fact comes to their knowledge they repudiate and so far as possible undo the wrong, it is not deemed the act of the bank, but that of the individual officer, for which he may suffer the penalty of the law.

The difference in the two cases lies in the locus of control. The reins are in the hands of the directors, and, if they do not do their duty in the selection of horses or harness, or drive improperly, the owner of the coach may well be held; but if no fault attaches to them or to the owner, it would be carrying liability to a great extent to hold the latter for the stumbling of one of the horses. If those in *control of the bank* obey the law, the public will be little exposed to wrong, or excess of power; and no necessity for the public's protection existing, as in the case of the board, it would be hardly fair to punish the innocent stockholders for the occasional fault of a subordinate.

If the board violates the law by action entirely aside from any handling of the property or business of the bank, as if they form a conspiracy to do some felony or overthrow the government, of course that is not the act of the bank; it must be done in the course of their management of the bank, its interests, or property.

Bank v. *Surety*

§ 85. Between the bank and the surety upon the bond of an officer, no act of the board, nor of any one beside the stockholders, can relieve the surety from liability for the guaranteed officer's breach, unless it is otherwise nominated in the bond. The very purpose of the bond is to secure the bank against the fraud or incompetence of the officer, and its value would be slight if the fraud or incompetence of another officer precedent or subsequent were to be the death of the surety's obligation. (See Official Bonds.)

Bank v. *Third Parties in General*

§ 86. We will now consider the last phase of the problem in which the bank is a factor. When is the bank responsible to third parties for the act of its agent, and when can the bank hold third parties upon their dealings with A.? A distinction must be carefully noted. The questions, when is A.'s act B.'s act, and when is B. *bound by the act,* are very different questions. The latter is

not a question of agency. B. may act himself, and yet not be bound, as in case of a void contract, or an act which is *damnum absque injuria*, where no responsibility attaches in consequence of his act. In the case of a bank, when it is once determined that a certain act is that of the corporation, the question whether it is bound by the act in contract, or responsible for it as a tort, or a crime, is one with which we are not concerned here, as it does not depend upon the principles of agency. It may just be noted in passing, that, if the act is *intra vires*, the bank is bound just as a private person would be; if *ultra vires*, its responsibility depends on principles discussed in § 722 *et seq.*

The question for us here, and it is one of great importance, is this: When is an agent's contract, tort, knowledge, representation, payment, or other act, that of the bank as to third parties?

§ 87. **Contractual Acts.** — First, of acts from which arise contract liabilities, considering them in relation to such liabilities, as distinguished from liabilities in tort.

Neither Bound on the Contract

A transaction of the agent A. may create a contract between the bank B. and a third party C., or between A. and C., or both in one transaction; or though one of these relations is sought, they may all fail; as if A. act beyond or without authority from B., or the contract is in such form that *it* cannot legally be the act of B. (as a deed in A.'s name), or if C., knowing that A. is acting as an agent, gives exclusive credit to him, and with one or other of these facts which prevent B.'s liability on the transaction there co-exists a fact preventing it from being A.'s contract, as when he uses no words in a written contract that can charge himself, and in any case where there are no circumstances showing that any credit was given to A.

(There are other cases where the contract, though *the act* of A. or B., does not *bind* either, as where the party whose act the contract is, is incapable, or the consideration fails, or is immoral or against policy, or void by statute, or *ultra vires;* but, as said above, these are matters outside the subject of this division.)

§ 88. Although the transaction may not be such as to hold either the agent or the bank *on the contract*, yet one or both may be held by obligations implied by law on the facts.

Thus a committee of a corporation contracting for the company

with full authority used their individual seals instead of the corporate seal, which is essential to the making of a corporate deed, drawing therefor an instrument that was not their own contract, for they could not individually deed away the company's land, nor the company's contract, because of its form; yet, as they acted with due authority, assumpsit could be brought against the company founded on the obligation of the stipulations in the instrument.

Benefit Received must be Accounted For. Agent Liable to Third Party

(*a*) So benefits of any kind received under a transaction that fails as a contract express, must be accounted for, and in any case where an agent A. fails to give the third person C. a right of action against the bank according to the tenor of his agreement, and is not himself bound on the contract, still A. is liable to C. in case, unless the failure of the contract is due *to facts equally within the contemplation of* both parties A. and C.; as if A.'s authority were by facts unknown to him revoked.

§ 89. Two things chiefly must be taken into consideration in determining to whom belongs a given contractual act: 1st, the intent of the parties, their understanding as to whom credit is given, in the transactions; 2d, the authority of the agent, actual, inferred, or arising by ratification.

Third Party Holds Bank

(*a*) The general principles are: —

First. Unless the case comes under the fifth head below, C. has a right to consider the act of A. to be that of B. whenever A. and B. are really identical in the matter (whether A. disclosed to C. that he was acting for B. or not, except that an undisclosed principal cannot be subsequently held to his injury, as if he has settled with A. while still having reason to believe that C. is giving exclusive credit to A.), and whenever B.'s conduct has been such as to warrant a man of ordinary prudence in concluding that A. is acting for B. with his approval and consent.

For example, a national bank, with the knowledge of its officers, was in the habit of receiving money on deposit, and issuing certificates therefor, sometimes in its own name, sometimes in that of Van Campen, the president. This course of business, being known

to and permitted by the officers, was with authority as to third parties, and the bank was held liable to a depositor who took a certificate purporting to be issued by Van Campen personally, the depositor believing it to be the obligation of the bank, and so accepting it.[1]

Ratification

(*b*) Also, if A.'s act ostensibly and avowedly for B. is afterward, with knowledge of the facts, ratified by the power which could have given previous authority.

Benefit Retained. Ultra Vires, 1st Class of Cases

(*c*) And one class of cases goes a step beyond all this, and holds that, even when C. knew that the officer or the board were acting *ultra vires* of the bank, and therefore of course beyond their authority, yet, if the bank receives and retains the benefit of the transaction, it cannot interpose the plea of *ultra vires* in a suit upon the contract.[1a] This amounts to sustaining against the principal a contract made by an agent beyond his authority, for it is not necessary that the stockholders should act in the matter; it is sufficient if the *board of directors* receive and retain the benefit for the bank. This applies, of course, only to executed contracts, no agent's executory contract *ultra vires* of the bank can bind it, whether C. knew or not of its true character.

True Rule 2d Class of Ultra Vires Cases

(*d*) Another less numerous but more consistent class of cases hold that the act of an agent beyond his authority, and known by C. actually or constructively to be so, is not the act of the bank as to C., and *it cannot be held on the contract*,[1b] although if it has received benefit by reason of the transaction, it must account for the same.

(*e*) In general all acts of an agent that are done officially,[2] and that fall within the scope of his powers and duties,[3] are in law the acts of the corporation itself. Whether these be rightful or

[1] § 89. West *v.* First National Bank of Elmira, 20 Hun (N. Y.) 408. See Smith *v.* Rathburn, 88 N. Y. 660; Germania Ins. Co. *v.* R. R. Co., 72 N. Y. 91; Upton *v.* Tribilcock, 91 U. S. 50, 23 L. ed. 206.

[1a] See § 722.

[1b] See § 722.

[2] Hughes *v.* Bank of Somerset, 5 Litt. (Ky.) 45.

[3] New Hampshire Savings Bank *v.* Downing, 16 N. H. 187.

wrongful, innocent third parties have the right to regard them in this light, and the law will thus construe them. In like manner, knowledge obtained by the agent in his official capacity, and within the scope of his agency, will affect the corporation; and declarations made by him in the like manner, and within the like range, will bind the corporation. But acts done, knowledge obtained, or declarations made, beyond such scope, or not in an official capacity, do not affect the company at all.[4]

The bank's liability to third parties is not affected by the fraud of the officer upon the bank in the transaction, if it was unknown to such third party.[5]

Bank Holds Third Party. Third Party cannot be Prejudiced by Ratification

§ 90. *Second.* The bank can hold a third person, C., as to a contract made with it directly, so far as its agent was really acting for it (under authority directly from the organic law, or from the bank itself, or from the lawful order of a superior or recognized usage, or necessity), unless exclusive credit was given to A. under the fifth head below, and so far as his action, though without actual authority, was ostensibly for the bank, and with knowledge of the facts has been adopted or ratified by that body which could have authorized the act previous to its performance, [bearing in mind, however, that although the general rule is that ratification discharges an agent from responsibility to his principal, (or to the third person, C., except so far as expressly bound by the contract,) and makes the act of the same effect as if with antecedent authority, yet C. cannot be affected injuriously by the ratification where his conduct in the meantime must depend on the question whether the act was with power at the time; for example, if A. without authority demand B.'s goods from C., no ratification can make C.'s refusal a conversion, for the delivery to A. would not have been good. So, if A. makes an unauthorized demand

[4] Bank of Columbia *v.* Patterson's Adm'r, 7 Cranch 299, 3 L. ed. 351; Fleckner *v.* Bank of United States, 8 Wheat. 338, 5 L. ed. 631; Atlantic Bank *v.* Merchants' Bank, 10 Gray (Mass.) 532; Fulton Bank *v.* N. Y. & Sharon Canal Co., 4 Paige (N. Y.) 137; Boom *v.* City of Utica, 2 Barb. (N. Y.) 104; New England F. & M. Ins. Co. *v.* Schettler, 38 Ill. 166; Wright *v.* Georgia R. R. & Banking Co., 34 Ga. 330; Wyman *v.* Hallowell & Augusta Bank, 14 Mass. 62; Salem Bank *v.* Gloucester Bank, 17 *id.*, 1; Madison & Indianapolis R. R. Co. *v.* Norwich Saving Soc., 24 Ind. 457.

[5] Citizens' Savings Bank *v.* Blakesley, 42 Ohio St. 645.

for a debt due to B. from C., a ratification will not prevent C. from pleading a previous tender; for if he had paid A., it would have been no discharge of the debt. So also notice of dishonor by a stranger is not good by ratification.[1]]

Also, if a third person, C., hold the bank, B., to a contract made by A. without actual authority, and not ratified, B. can hold C. to a fulfilment of his own part of the agreement.

Ultra Vires

(*b*) And, under the first head, there is a class of cases holding that the bank can hold C. to his part of an *ultra vires* contract when C. has received a benefit from the transaction which he cannot or will not give up.[2]

§ 91. *Third.* If A. acts neither really nor ostensibly for the bank, it cannot assume the contract.

§ 92. *Fourth.* If A. avowedly contracts for the bank, but is himself the real principal, he must give the third person, C., notice of his real character before he can sue him, and if the fact that the bank was supposed by C. to be a party entered into the consideration, A. cannot hold C. at all, if the contract is executory on A.'s side, nor can he in any case avoid any defense C. could have made if A. had told the truth.

Exclusive Credit to the Agent

§ 93. *Fifth.* **Intent of the Parties.** — If the third person, C. (not being ignorant of the existence of a principal behind A., to whom he might have given credit if known), gives exclusive credit to the agent, A., as where a bond is given in A.'s name, or the circumstances show that the contract was intended to be exclusively between A. and C., the bank can neither sue nor be sued on the contract, though it may be entitled to the benefit of it, or concluded by it, and entitled to collateral rights, and subject to and entitled to remedies growing out of it.

Exclusive Credit to the Bank

§ 94. *Sixth.* If the third party, C., gives exclusive credit to the bank, the agent is not generally liable on the contract, though

[1] § 90. Stanton *v.* Blossom, 14 Mass. 116. [2] See *ultra vires*, § 722.

he may be liable in case of any misrepresentation or fraud; however, if A. contracts in his own name as agent, adding his representative character, and he fails to sustain his right to this addition, his name will stand without the annex, and he will be personally bound by the contract, if it is one he could make himself.[1]

Concurrent Credit

§ 95. *Seventh.* Whenever it is the understanding of the parties A. and C. to a contract, that credit is given to both the agent, A., and the bank, B., or both A. and B. are really interested in the contract, or one is a party and the other interested, it is the contract of both A. and B., except that only the named parties to a sealed contract can sue or be sued directly on the contract, and that, whenever exclusive credit is given to A., and the understanding is that the principal is not to sue or be sued on the contract, this excludes B. from action on the contract directly. But A.'s right to sue on a concurrent contract is subordinate to that of B., (as, if B. sues first or discharges C., A.'s right is superseded,) except when A. has a lien or other interest in the subject matter of the agency, then he may enforce his right against both B. and C.

Presumption when Contract is in A.'s Name

(*a*) There is a concurrent contract by presumption of law whenever A., having authority to make a contract (not under seal), makes it in his own name, unless the circumstances make it clear that exclusive credit was given to A., and both parties intended that no resort should be had by or against the bank on the contract in any event. And this whether A. describes himself as an agent or not, and whether the third party, C., knew of the principal, B., or not.[1] Either A. or B. can sue and be sued in such cases, A. as the party to the contract, B. as the party in interest, and for whose benefit the contract was made.

(*b*) When A. does not disclose that he is acting as an agent for B., C. cannot be held to have elected to give exclusive credit to A.; for, not knowing of any one else in the matter, he had no chance to make the election which might have resulted if he had known A. was acting as agent, and this holds except where, as in the case of a foreign agent, it would be a conclusion of law that exclusive credit was given to A., even though B. were known.

[1] § 94. See § 128, n.

[1] § 95. Story on Agency, § 160 *a*.

If A. contracts in his own name, and his principal afterward becomes known, C. may elect which he will hold.[2]

Note to Cashier

(*c*) A note payable to the cashier of a bank, being the property of the bank, is by fair construction a contract with the bank, and it can sue in its own name, as the real party in interest.[3] It can also be sued on by the cashier.[4] So an order payable to "D. H. Neale, Pres.", may be the subject of suit by the corporation as the real party.[5]

Land Bought in Name of President

(*d*) So, where land conveyed in trust to secure a debt due the bank was sold under a prior incumbrance, and the president bought the land, taking a deed in his own name, delivering the note held by the bank, and giving his own note for the balance secured by deed of trust, it was held that, as the facts clearly showed the purchase to have been for the bank, and that the president had power to make it, although the president was the legal party, yet in equity the bank must relieve the estate by paying the note given by the president.[6]

And this is an agreement with the whole current of reason and decision, though Walker and Schofield, JJ., dissented.[6]

§ 96. **Authority of Agent.** — A third party, C., can hold the bank to A.'s act as if it were the bank's own act, if A. had actual or inferred authority.[1] The converse, however, is not true; for, as was seen under the first head, some cases hold the act B.'s where there was no authority, either actual or inferred, and ratification may transfer A.'s act to B.

§ 97. *Eighth.* **Actual Authority** is really existing *a priori* ground for holding the act of A. to be that of B. It may arise, —

[2] 2 Smith's L. C. 375.

[3] Commercial Bank *v.* French, 21 Pick. (Mass.) 486; Lookout Bank *v.* Aull, 93 Tenn. 647, 27 S. W. 1014 (1894).

[4] Johnson *v.* Catlin, 27 Vt. 89.

[5] Eastern R. R. Co. *v.* Benedict, 5 Gray (Mass.) 561.

[6] Libby *v.* Union National Bank, 99 Ill. 622.

[1] § 96. When negotiations for a loan are made at the rooms of the bank by a director who consulted in the matter with other directors then in session as a body there is evidence which tends to show that he had authority to act for the bank. Woodsville Guaranty Savings Bank *v.* Rogers, 86 Vt. 121, 83 Atl. 537 (1912).

(1) By the organic law, as in case of the power of directors of a national bank. (II. § 8.)

(2) By action of the corporate body.

(3) By lawful vote or verbal order of the board of directors, or other superior officer to the one doing the act. But if the superior exceeds his powers in giving the command, there is no *actual*, though there may be inferred authority.

(4) By appointment to an office to which certain powers belong inherently, so far as these are not restricted by the bank or the directors.

(5) By a long continued course of dealing, or series of acts with the knowledge of, and without objection from, the power which could expressly authorize the acts. This is the way in which inherent powers arose. They are usages judicially ascertained, the latest addition of large importance being the inherent authority of a cashier to certify. But no authority is born of a series of acts, if each one is done under special authority. (See 7 below.)

(6) By necessity. Whenever an emergency exists calling for immediate action for the manifest interest of the bank, the officer has authority to do the act by necessity.

No Usage Grows from Special Authority

(7) Performing an act a series of times, but each time under special authority, creates no general authority. The fact that an act has been several times done by an officer, who has, however, on each occasion performed it in pursuance of a vote or instructions of the directors, does not constitute such a custom for him to do the act as to make it binding upon the bank when he does it without such authority; and this is the case even where the outside party with whom he is dealing knows that the act or duty has been frequently performed by him in the past. Thus, where, by verbal consent, or under direction of the investment committee of the directors of a savings bank, the treasurer had frequently assigned mortgages to a purchaser, it was held that no such general or implied authority for him to execute assignments of mortgages arose as to make his assignment of one valid, in a case where he did so without instruction from the committee, though the assignee knew that such assignments had often previously been executed by this officer.[1]

[1] § 97. Holden *v.* Phelps, 135 Mass. 61.

§ 98. *Ninth.* **Inferred Authority** of an agent is such as reasonably appears to exist upon the *facts* of which the party C., dealing with him as agent, has actual or constructive knowledge, though in fact there may be no actual authority. C. in this matter must be held to a knowledge of the law and of facts to which he would have been led by the exercise of such diligence as men of ordinary prudence display under similar circumstances, and to correct reasoning upon such facts.

It is important to remember that no authority, actual or inferred, can arise except by law, or the act of the bank, or of a superior officer. A. himself cannot, by any mere words or acts of his own, create or enlarge his powers. The inference must be from the conduct of those who can command him, and it must be a reasonable inference from the facts fairly within C.'s reach. For example, if the directors order the cashier to make a loan, and C. has no notice that it is *ultra vires* as being beyond the legal limit, his inference that it is with authority is proper.

Course of Action without Objection

(*a*) If A. openly, and for a long time, does certain things without special authority, and there is no objection from the directors, C. properly infers A.'s authority; for if the directors knew of A.'s conduct it is a clear case of estoppel, and if this action was so open and long continued that they would have known of it by reasonable diligence, the bank cannot take advantage of the neglect of its agents in their duty, as against one misled and injured thereby.

Legal Appointment Inferred

(*b*) If the directors allow A. to perform the duties of a given office for a length of time, a third person, C., is justified in inferring his regular appointment and authority to act according to the customs of that office, and the same principle applies to the directors themselves.

Officers de Facto

The bank will be bound by the acts, within the scope of his apparent agency, of any one who is its officer *de facto*. The bank holds him out as its officer, and as having the right and duty to perform certain functions; and it is as fully responsible as if this right and duty had been, in every stage of its growth, perfect.

Such facts as that he has never been regularly or formally inducted into office, that all the requisites for his entry upon the active performance of its duties have not been complied with, — even that originally he was not legally eligible for the office, — will not suffice to free the bank from its liability upon the acts which it has permitted him to do in its behalf. Thus, directors coming into office through formalities purporting to be legal and sufficient, are directors *de facto*, and if their election was actually illegal, they can yet only be ousted by writ of *quo warranto*. One formally appointed cashier may bind the bank as a teller, if he is allowed as a matter of fact to perform the functions of a teller. Neither does the fact that one appointed to an office fails to take the oath, or to file the bond, which may be prescribed by statute or by-laws, vitiate or invalidate any of the acts done by him during his actual incumbency.[1] In the cited case of Baird *v.* Bank of Washington, less than a quorum of the directors elected a person to fill a vacancy in their board. The proceeding was of course irregular and illegal. But the person so chosen appeared at a subsequent meeting and voted. His presence and his vote were necessary to make a majority in the quorum then present. Nevertheless, the action taken at the meeting, and only taken by his assistance, was sustained as binding the bank, on the ground that he had come in under color of title, had never been ousted, and so was a director *de facto*.

An assignment executed by bank officers after their term had expired, under authority from stockholders granted before, *held* valid; the charter providing that, if election did not take place on the proper day, the corporation should not be deemed dissolved. The president and cashier were officers *de facto*, if not *de jure*.[1a]

Inherent Powers Inferred

(*c*) Whenever A. really holds an office, or C. properly infers that he does, the powers inherent in such office are, in the absence of notice of restriction, properly inferred to belong to A. An official title denotes certain powers and duties, and the officers

[1] § 98. Bank of the United States *v.* Dandridge, 12 Wheat. 64, 6 L. ed. 552; Minor *v.* Mechanics' Bank of Alexandria, 1 Pet. 46, 7 L. ed. 47; Delaware & Hudson Canal Co. *v.* Pennsylvania Coal Co., 21 Pa. St. 131; Cooper *v.* Curtis, 30 Me. 488; Smith *v.* Bank of the State, 18 Ind. 327; Baird *v.* Bank of Washington, 11 Serg. & R. (Pa.) 411. See § 40.

[1a] Milliken *v.* Steiner, 56 Ga. 251.

of a bank are held out to the public as having authority to act according to the general usage, practice, and course of business of such office in such institutions; and their acts within this scope bind the bank in favor of third persons having no knowledge that their position does not truly represent their power.[2]

(*d*) This matter, being of much importance, will be expanded to some degree in order fully to illustrate the operation of the principle.

Expansion. — Any person who deals innocently with the agent or officer of a corporation within the scope of that agent's or officer's functions will be fully protected, and will have his contract enforced by the law. This rule accords so perfectly with both law and justice that it has never been directly assaulted, save in one class of cases. These are where the agent, acting indeed within the general and ordinary scope of the agency, is yet in fact contravening some express order, or exceeding some special limitation of authority, imposed upon him in derogation of his natural and usual power. When such cases have arisen, corporations have sometimes sought to avoid responsibility by insisting that, since their agent had exceeded his powers he had not bound his principal. In such cases the simple question is, whether or not the third party dealing with the agent had a *right to suppose* that the agent was dealing within the scope of his authority. If the ordinary functions of an agent are well known, a secret limitation of those functions will not be allowed to operate to invalidate his act done in excess of the secret limitation, but within the ordinary scope. The secret limitation can take effect only when notice of it is directly brought home to the third party. Any other rule would open wide the door to endless deceit and false dealing.[3] As a general principle, this is sufficiently clear and well established. But in the case of banking corporations it is liable to confusion from the uncertainty attendant upon the knowledge which any individual has of the real limits of the powers and duties of any particular officer. If a statute defined accurately the acts which

[2] Minot *v.* Mechanics' Bank of Alexandria, 1 Pet. 46, 70, 7 L. ed. 47; Fleckner *v.* Bank of United States, 8 Wheat. 360, 361, 5 L. ed. 636; Frankfort Bank *v.* Johnson, 24 Me. 490; Merchants' Bank *v.* State National Bank, 10 Wall. 604, 19 L. ed. 1008; Cooke *v.* State National Bank, 52 N. Y. 96.

[3] Mayall *v.* Boston & Maine R. R. Co., 19 N. H. 122; Farmers & Mechanics' Bank *v.* Champlain Transportation Co., 23 Vt. 186; Clarke National Bank *v.* Bank of Albion, 52 Barb. (N. Y.) 592.

each officer should be competent to perform, this difficulty would be decreased. But in the absence of such enactments every board of directors may assume, and very many in fact do assume, to define the functions of the respective officers according to their own notions of propriety in such matters. Or it may be that the board will conceive it preferable to attempt no such definition, but simply to appoint one person to be "cashier", another to be "receiving teller", another to be "paying teller", and so on through the various offices. Now in either of these cases it is natural, indeed it is necessary, that a third person should suppose that these various officers are empowered to perform the duties which the ordinary usage and method in the transaction of banking business leave in the hands of such officers. Upon this supposition it is practically necessary that the public should act in dealings with the bank. Certainly the supposition is sufficiently vague. The basis of usage on which it rests is little more stable than a quicksand. It is not uniform in different cities, often not in different institutions in the same city, and perhaps is not permanent in the same city or institutions throughout a long course of years. Still, a small nucleus of certainty has grown by degrees into existence amid the great uncertainty. The word "cashier" means something; the word "teller" means something. This is shown very conclusively by the frequency with which directorial boards content themselves with simply installing a person in one or other of these offices without any effort to name the appurtenant duties, but assuming by unavoidable implication that of course there is a certain well-known range of powers and duties as naturally and necessarily constituting the office, and as publicly known and understood to do so, as if they should be embodied in a written vote. Courts have many times recognized the same fact, and have decided that president, directors, cashier, and teller have or have not either exclusive or concurrent powers to do acts of the nature designated in the particular case. For example, the power to discount is exclusive in directors, as such. The power to draw checks is in the cashier by virtue of his office. The president *qua* president is empowered to defend suits and engage counsel on behalf of the bank. There are then certain classes of acts which the law recognizes as properly to be performed by certain officers. These classes may be enlarged by future decisions. The only absolute limit yet established is when judicial *dicta* have declared some special power *not* to be inherent

in some special officer. Starting then from this position, that there are certain powers, only a portion of which are yet known by the certain knowledge which grows out of a judicial ruling, which belong to and constitute a certain office, it is clearly reasonable and just that the public, and any individual member thereof, dealing with a person notoriously filling such an office, should have the right to presume, in the absence of express notification to the contrary, that such person has such powers. It may be that a board of directors could by vote declare that their cashier should not have power to draw a check. But if they still allow him to fill the office of cashier, as to all third parties dealing with him in ignorance of this unusual limitation, he must still be allowed to bind the bank by the exercise of this customarily inherent authority. That he has exceeded the scope of his agency may be urged by the bank against him personally, and may be an abstract truth; but it is one which public policy will never allow the bank to set up against the claim of a third party who dealt in ignorance of this peculiar and extraordinary limitation. If therefore the corporation, or any authority within and on behalf of the corporation, undertake to set strange limits to the powers which it will allow to be exercised by its officers, it must either refrain from giving to these officers the titles usually regarded as indicative of such powers, and for that reason equivalent to a general holding out of them to the world as possessing such powers, or it must bring home to persons dealing with them a knowledge of the limitations it has seen fit to draw round the offices. Otherwise the corporation will be bound by acts of its president within the scope of the ordinary and legally inherent duties and powers of a president; by acts of its cashier within the scope of the ordinary and legally inherent duties and powers of a cashier; and so on, through the whole range of officers.

An Official Title Connotes Certain Powers which, in the Absence of Notice to the Contrary, Bind the Bank as to Third Parties

(*e*) Obviously the names and titles by which the various agents are denominated are intended to designate, and must be presumed to designate, the nature and scope of their respective agencies. If a banking corporation gives to an individual a title which in ordinary banking parlance is attached to a certain range of powers and duties, it cannot afterwards be heard to say that the secret instructions of the corporate government, or the pecu-

liar by-laws adopted by it, have deprived the officer of these powers and duties, or any of them. One dealing with the officer of a bank, within the ordinary and legal scope of such an officer's authority, is entitled in justice and at law to assume as against the bank that the officer is invested with this customary authority.

Neither does it make any difference in this respect that the charter, or the statute under which the corporation exists, gives to the board of directors power to settle the respective functions of the subordinate officers. Our National Banking Act [4] empowers the directors to "appoint a president, vice-president, cashier, and other officers, *define their duties*", etc.; also "to define and regulate by by-laws . . . the manner in which . . . its officers [shall be] appointed, its property transferred, its general business conducted, and all the privileges granted by this act to associations organized under it shall be exercised and enjoyed." Occasionally, in other enactments, the expression "to define and limit" duties has been used. But, after all, these phrases probably give to the directors no power over their officers which they would not be allowed to exercise by virtue of their common law authority.[5] The directors are the government of the bank, and must have power to direct and control the acts and doings of the other and subordinate agents. But whether at common law or under such statutory enactments they seek to curtail the ordinary powers of any of their officers, their action in so doing can only be valid as between the officer and the bank. If the officer does what they have expressly forbidden him to do, though it be an act ordinarily within the range of his functions, he will be liable only to the corporation for the results of his disobedience. The directors unquestionably have the power, *as against him*, to "define" his duties generally, or to "regulate" or "limit" them upon any particular occasion, and in any particular matter. They may also have the same power as towards any individuals among the public, or even as towards the entire public. But it is an absolutely indispensable preliminary to the exercise of the power in this direction that the individuals or the public should receive actual notice of the fact.

The judicial authorities seem fully to sustain the propounded doctrine. The matter is one of sufficient importance to justify the quotation of the more conclusive passages. The New York Court of Appeals say: "The whole tenor of authority is in

[4] Stat. 1863–64, chap. 106, § 8.

[5] Merchants' Bank *v.* State Bank, 10 Wall. 604, 19 L. ed. 1008.

favor of holding corporations for the acts of their officers, especially executive officers and general agents, within the general scope and apparent sphere of their duties, and not holding them for acts done without special authority in cases without such scope and general sphere of duty. The cases are all reconcilable and sustainable on this principle, and no other. Courts and judges have spoken cautiously on the subject, but the language has been uniform, limiting the responsibility of corporations for the acts of their officers and agents, in the absence of an express authority to do the particular act, to those performed in the discharge of their ordinary duties in the usual course of business, and within the sphere and scope of such duties. Such are presumed to be by authority of, and within the knowledge of, the directors; and within the rule are included such acts as are shown to have been performed with the knowledge and implied consent of the directors, although out of the line of ordinary duty and usual course of business. . . . It must be assumed, therefore, and the public and those dealing or having business transactions with the bank had the right to assume, that they [the officers of the bank] had and exercised the powers and performed the duties usually devolved upon and performed by persons occupying the same positions in other banks, and such as they were in the habit of performing in the transaction of the current and ordinary business of the bank; and within this limit the corporation would be bound by their acts, in the absence of proof that their powers were limited or restricted, and that such restriction or limitation was known to the persons dealing with them. Whatever may be the extraordinary or incidental powers of the corporation under its charter, power to bind the corporation can only be presumed to exist in its executive agents and officers within the scope of its ordinary business and their ordinary duties." [6] In Minor *v.* Mechanics' Bank of Alexandria,[7] the court say: "Officers of a bank, as of any other corporation, are held out to the public as having authority to act according to the general usage, practice, and course of their business. Their acts within the scope of such authority will generally bind the bank in favor of third persons possessing no other knowledge." In The Bank of Vergennes *v.* Warren,[8] discussing the legality of an act, which the court held to fall within the scope of the cashier's power, *qua* "cashier", the

[6] First National Bank *v.* Ocean National Bank, 60 N. Y. 278.
[7] 1 Pet. 46, 7 L. ed. 47.
[8] 7 Hill (N. Y.) 91.

judge said, "Indeed I think it would not defeat the purchase if it could be shown that the cashier had been forbidden by the principals to transact such business." In Commercial Bank of Buffalo *v.* Kortright,[9] the court applies to banks and their officers the general rule of agency, as laid down in Story on Agency, §§ 127, 133, that the principal is bound by acts which he holds out his agent as competent to perform, despite that they may contravene secret instructions or orders. Unquestionably any person invested with the familiar title of an official position in a bank is held out to the public as competent to perform all the usual and inherent or essential functions of the office. In Wild *v.* Bank of Passamaquoddy,[10] it was said, that any bank choosing to restrict the ordinary scope of its cashier's authority is at perfect liberty to do so; but that, in such case, it is incumbent on the bank to show, not only the fact that it has imposed a certain restriction, but, further, that the imposition of this restriction, being of a peculiar and unwonted kind, *is known* to those with whom it is in the habit of doing business. In Franklin Bank *v.* Steward,[11] it was said that the cashier's "true position appears to be that of a general agent for the performance of his official and accustomed duties. While acting within the scope of this authority, he would bind the bank, although he might violate his private instructions."

Act in Violation of Charter may Bind the Bank

(*f*) The case of Lloyd *v.* West Branch Bank [12] is perhaps even stronger than any of the others. For though the judge in that cause is considering, not the case of a circumscribing vote of a directorial board, but the actual charter of the bank itself, he does not hesitate to apply the same principle.[12a] The decision is rather striking by reason of the vigor and oddity of its expression, but it is certainly sound. It is, briefly, to the effect that recognized and known functionaries, *especially the officers of a bank, are held out to the world as having authority to act according to the general usage, practice, and custom of the business in such institutions.* Otherwise there could be no safety for the public in doing business with them. Their charters differ in some respects, and individuals cannot be presumed to "carry these documents in their

[9] 22 Wend. (N. Y.) 348. [10] 3 Mason 505. [11] 37 Me. 519.
[12] 15 Pa. St. 172. [12a] See *Ultra vires*, §§ 89*a*, 722.

pockets as a *vade mecum*." The acts of officers, therefore, in the scope of such general usage, practice, and course of business, bind the corporation in favor of third persons who did not know at the time that the officer was exceeding the course of his authority. In the Commercial Mutual Marine Ins. Co. *v.* Union Mutual Ins. Co.,[13] — which, though not a bank case, yet covers the point now in discussion with great thoroughness and accuracy, — a contract made by the president in contravention of secret limitations was upheld. The court declared that, in order to show that the corporation held out their officer as competent to make such a contract, it was sufficient evidence to show a usage among such companies to make such contracts through such officer. In Neiffer *v.* Bank of Knoxville,[14] a contract, made not in accordance with the provisions of the charter, was nevertheless upheld on the ground that customarily such a contract could have been made by the officer who had in this case irregularly undertaken to make it; and that therefore it should be enforced in favor of the third party who had entered into it in good faith and in ignorance of the charter restriction. But see pp. 203, 209, and § 722.

The cases, it will be observed, relate especially to the acts of cashiers, — a circumstance fully explained by the fact that the cashier is the chief executive officer, and that naturally his acts are more often the subject of controversy than those of other officials. But the general principle which runs through the decisions is equally applicable to a president, teller, or other agent whomsoever.

The Bank may Restrict or Enlarge Officer's Powers

(*g*) None of the above cases deny or infringe the statutory right of defining, restricting, or limiting official powers. On the contrary, nearly all of them in terms distinctly recognize the power of the directorial board, or the government of the corporation, to prescribe, either with the effect of enlargement or circumscription, the functions of any officer. They only superadd to this right (making no distinction, as we have above pointed out, whether it owes its existence to common law, charter, or general statute) the duty of bringing home knowledge of their action to the individual dealing with the officer, whenever, in the absence of such knowledge, he would naturally be deceived and injured

[13] 19 How. 318, 15 L. ed. 636. [14] 1 Head (Tenn.) 162.

by relying simply upon the usual course and usage of banking business. Since the power to define and limit does exist, it must be supposed to have some value, and the language of the statute must be allowed to describe some substantial privilege. The power is indeed valuable, and the privilege substantial, and no definite limit can be set to either, provided only that the one requisition is complied with of giving due and sufficient notice of its exercise in any instance. It must then necessarily affect and bind the party notified.

If C. has Notice the Agent is not Acting within His Inherent Power, He is Put to His Inquiry

(*h*) Two English cases well illustrate this rule. A cashier indorsed negotiable paper, which ordinarily he would have been empowered to do by the inherent authority of his office. But he preceded this indorsement by the words "*per proc.*" He was in fact acting under a peculiar and special authority, distinct from that ordinarily vested in him by his office; and these words were intended to notify the dealer of this circumstance, and were words customarily having this warning or admonitory significance. The court held that the notice that the authority was special and peculiar, and therefore wholly distinct from that appurtenant to the cashier as such, was sufficient.[15] In fact, the cashier, though doing an ordinary act, was not doing it under his general official authority, but under an independent and unwonted delegation of power. The words prefixed were, by their well-known meaning, equivalent to a direct statement to this effect to the dealer, who was then and thereby put upon his inquiry if he wished to ascertain precisely the nature and extent of the special authority. If he did not care to be at the pains of satisfying himself on this point, but relied on his opinion of the cashier's character, or simply yielded to indolence or carelessness, any resulting loss must properly fall wholly on him. He had received a full and sufficient warning that the cashier was not in this matter authorized to deal with him by virtue and in the exercise of his customary official authority, and he could not afterward be allowed to appeal to that customary official authority to support the regularity and validity of an act which he was distinctly notified at the time was not done under it.

[15] Alexander *v.* MacKenzie, 6 C. B. 766; Stagg *v.* Elliott, 12 C. B. (N. S.) 373; s. c. 31 L. J. C. P. 260.

(*i*) The authority implied from a public holding out, tacit acquiescence, or usage and ordinary course of dealing, can never go beyond the power which the bank could legally confer on the officer *under the circumstances of which C. has notice; i.e.* if, as a matter of law on the facts within C.'s reasonable reach, the act is one for which previous authority could not have been given by that power whose conduct is the basis of inference in the matter, then C. has no right to infer authority from the facts named. They only suffice to confer upon the officer *just as much* authority in the premises as he could have derived from an empowering resolution of the board of directors, or of the corporate body. Whatever limitation there is, if any, upon the functions which the government of the corporation can by their direct vote enable him to assume, that same limitation equally curtails the functions which usage, acquiescence, or public holding out will enable him legally to exercise on behalf of the bank. If any official undertakes to exercise any authority with which the corporate government have no legal right to invest him, he does not in its exercise bind or affect the bank, no matter how old, how well known, or how frequent has been the previous practice.

Yet it must be kept in mind that though *executory* contracts *beyond authority* will not be enforced, yet, if partly *executed*, they may be. (See *First*, above.)

In Minor *v.* Mechanics' Bank of Alexandria,[16] it was said that the power by implication would be held good, *provided* it were one which could be conferred by a written vote of the board of directors. Circumstances may be shown, among which are especially usage and holding out, which dispense with proof of the vote, and either estop the corporation to deny it or make its supposed existence a conclusive presumption of law. But this does not affect the imperative requisition that such a vote, *if it ever had been passed*, should have been legal and valid, and within the powers of the board. Since no one can allege ignorance of the law, persons dealing with the bank are held to know those limits which surround the *possible* powers of each particular officer, and which can be extended by no process whatsoever, be it by the most perfect of usages or by the most formal of votes. If one deals with an officer beyond these described limits, there is nothing which he can prove which will protect him; if it is matter of law that a certain function or act falls exclusively or inalienably within

[16] 1 Pet. 46, 7 L. ed. 47.

the range of the powers and duties of one officer, no state of affairs can cause the performance of that function or act by another officer to affect or bind the bank. There are such exclusive and inalienable functions in the various officers, as will be seen hereafter; and it behooves the public to become acquainted with them, since usurpation by bank officers of each other's functions, though often innocently done through ignorance and mistake, is not uncommon, and frequently, by force of the above doctrine, works a mischief to the customer which the law is impotent to cure. The case of Farmers and Mechanics' Bank *v.* Butchers and Drovers' Bank [17] furnishes a good example in this matter. Seldon, J., delivering the opinion, said that, though a custom for a cashier or a teller to certify a check might be perfectly good, yet it was subject to the limitation that it could only be good where the drawer had funds in the bank. In the case under consideration the drawer had not funds, and the holder was aware that he had not. The legal limitation of the power of certifying, which rendered certification under these circumstances invalid, was a rule of law of which the holder of the check could not be heard to declare himself ignorant. It was an absolute rule of law, and the holder must be held to know that it was such, and that nothing could dispense with its operation. Knowing the fact of the deficiency of the drawer's assets, which brought that principle of law into operation, he ought also to have known that as an unavoidable consequence the certifying officer was exceeding the *possible* limits of his authority. The loss, therefore, must rest upon him for having accepted a certification which the law would conclusively presume that he knew to be invalid.

(*j*) An interesting case on the subject of authority has been decided in the Court of Appeals of New York. It has been laid down that an officer may conclude the bank by an act obviously pertaining, by strict right, to quite a different functionary. A customer of the bank, having overdrawn his bank account, went to the bank and paid in somewhat more than enough to cover the deficiency, handing the money over the counter to the paying teller. The court held that this constituted a sufficient payment to the bank. It did not appear whether or not the receiving teller was in the bank at the time, and it did appear that an entry to the credit of the customer was made on the books of the bank for the

[17] 16 N. Y. 125. To the same effect is Mussey *v.* Eagle Bank, 9 Met. (Mass.) 306. See also Salem Bank *v.* Gloucester Bank, 17 Mass. 1.

amount paid in to the paying teller. But these facts do not seem to have been regarded as indispensable for furnishing a foundation for the decision of the court. The breadth of the ruling will appear from this quotation: "When one goes into a bank and finds behind the counter one of its officers employed in its business, and upon his demand pays a debt due the bank in good faith, without any knowledge that the officer's authority is so limited that he has no right to receive it, he must be protected, and the bank must be bound by the payment." If one were inclined to question or criticise this dictum, it might be fair to say that a person who undertakes to pay his debt to the bank to a person whom he knows to be the "paying" teller cannot be said to make his payment "without any knowledge that the officer's authority is so limited that he has no right to receive it"; — more especially since in this case the customer knew not only that there was a cashier, but also that there was a receiving teller. The paying teller had written to the customer on the matter of the overdraft, asking him to adjust the overpayment, and as there was no evidence that the receiving teller was present, but it was shown that in his absence the other officers acted in his place, it may be presumed that together with the presumption of regularity these facts made out a case of a substitution in the mind of the court, and at any rate the ruling must be confined to the facts.

It is in general held that, when C. pays money to an officer to whom its reception does not belong, such officer is the agent of C. to bring the money to the possession of the bank by delivery to the proper officer.[18] But a misstatement by an officer as to the proper designation of his office cannot prejudice the rights of third parties, dealing with the bank.[18a]

Upon the same principle, it has also been held that to make a subscriber's payment of his subscription money for capital stock a sufficient payment and binding upon the bank, it must have been made to an officer authorized to receive it.[19] So where the bank has a receiving teller, whose proper province it is to receive deposits, the bank is not liable to reimburse a depositor who has handed in his funds to the bookkeeper, if it happens, that, after their receipt by that improper and unauthorized officer, they are

[18] East River National Bank *v.* Gove, 57 N. Y. 597; Manhattan Co. *v.* Lydig, 4 Johns. (N. Y.) 377.

[18a] Bickley *v.* Bank, 43 S. C. 528, 21 S. E. 886 (1894).

[19] State *v.* Commercial Bank, 6 Sm. & M. (Miss.) 218.

lost or embezzled before they come to the hands and possession of some one whose special function it is to receive or to keep them.[20] On the other hand, the bank has been held liable to reimburse in a case where its manager had succeeded in obtaining and misappropriating the money of a customer, inasmuch as in the conduct of the transaction the officer had done no act which was not strictly within the scope of his legal functions, and had induced the customer to believe that he was acting simply in the regular and ordinary course of the business of the banking-house.[21] We see, therefore, that, in general, no act binds the bank unless done by the officer actually empowered,[21a] or whom the customer has a right to believe empowered, to do it; and that every act done by an officer within this scope will bind the bank. The rule will hold good even though the act is in fact fraudulent, provided the customer has no knowledge of the fraud, but is himself dealing *bona fide*, and believes the official to be dealing in the like good faith in the business of his principals.

Representations. Notice

(*k*) If an officer is acting, speaking, or receiving information in matters which the ordinary usage of the banking business casts within the range of his functions, the bank is bound and affected thereby, as any other principal, by the act, declaration, or knowledge of the agent.[22] No corporate vote is necessary to give validity to a contract made by an agent in a matter concerning which he has, from any source, the power to contract.[23] But no officer

[20] Manhattan Co. *v.* Lydig, 4 Johns. (N. Y.) 377; Thatcher *v.* Bank of State of New York, 5 Sandf. (N. Y.) 121. Though a later case seems, in spite of the effort of the court to draw a distinction, to establish a contrary rule. East River National Bank *v.* Gove, 57 N. Y. 597.

[21] Thompson *v.* Bell, 26 Eng. L. & Eq. 536.

[21a] A national bank examiner is not an officer or agent of the bank and has no authority, as such, to act for a bank, and cannot bind it by any act done in its behalf. Witters *v.* Sowles, 32 Fed. 762.

[22] Wyman *v.* Hallowell & Augusta Bank, 14 Mass. 58; Salem Bank *v.* Gloucester Bank, 17 *id.*, 1; Hooker *v.* Eagle Bank, 30 N. Y. 83; New Hampshire Savings Bank *v.* Downing, 16 N. H. 187; Second National Bank *v.* Howe, 40 Minn. 390, 42 N. W. 200.

[23] Eastman *v.* Coos Bank, 1 N. H. 23; Lime Rock Bank *v.* Macomber, 29 Me. 564; North Brookfield Savings Bank *v.* Flanders, 161 Mass. 335, 37 N. E. 307 (1894).

A vice-president who is in charge of a bank has authority to make contracts and may bind the bank by extending the time of a demand note for a specified time and may suspend the right to sell collateral until the

can bind or affect the bank by any dealing in the department allotted to another officer. The bank, in appointing various officers, is simply creating various perfectly distinct and independent agencies. Each agent can act only in his own agency.[23a] In like manner, demand or notice can affect the bank only if it be made upon or given to the officer having charge of the subject matter which the notice concerns. If it be given to one within whose sphere the business in question does not fall, the bank is not chargeable with it; neither is it answerable for negligence if it fails to act upon it.[24] For example, the bookkeeper of a bank has nothing to do with its litigation, and notices in a lawsuit served upon him would not ordinarily be valid as notices served upon the corporation. So it has been held, that knowledge on the part of a clerk in a bank of the residence of an indorser on a note would not prevent the holder of the note from asserting and availing himself of the ignorance of this fact on the part of those officers of the bank having charge of this department. Their ignorance was the ignorance of the corporation; but the knowledge of the clerk was not the knowledge of the corporation.[25]

Holding Out by Usage without Objection

(*l*) A very simple and unquestionable method of holding out is by allowing an officer repeatedly to perform any specific act, and recognizing his performance as proper and valid. Long usage implies authority equally with an express resolution.[26] It has been said that a corporation is not bound by any act of its agent simply because it has been his previous practice to do similar acts, unless knowledge of this previous practice is brought home to the corporate government.[27] As a broad statement in tech-

expiration of the time. Wyckoff *v.* Riverside Bank, 135 App. Div. 400 (1909), 119 N. Y. S. 937.

[23a] Where an attorney, acting for a bank which has received from a debtor conveyances of cattle encumbered by other debts, is sent to the cattle range to collect and receive the cattle, he is not authorized to promise to pay certain liens on the cattle. Panhandle National Bank *v.* Emery, 78 Tex. 498, 15 S. W. 23 (1890).

[24] Goodloe *v.* Godley, 13 S. & M. (Miss.) 233; Commercial Bank of Manchester *v.* Bonner, *id.*, 649.

[25] Goodloe *v.* Godley, 13 S. & M. (Miss.) 223.

[26] Hoyt *v.* Thompson, 1 Seld. (N. Y.) 320; Elwell *v.* Dodge, 33 Barb. (N. Y.) 336; Lloyd *v.* West Branch Bank, 15 Pa. St. 172; Lohman *v.* N. Y. & Erie R. R. Co., 2 Sandf. Super (N. Y.) 39; Northern Central Railway Co. *v.* Bastian, 15 Md. 494; Dougherty *v.* Hunter, 54 Pa. St. 380.

[27] Lawrence *v.* Gebhard, 41 Barb. (N. Y.) 575.

nical terms of a legal doctrine, this is unobjectionable enough. But it should be understood that the knowledge may be such as arises or is implied by imperative implication of law, as well as knowledge which exists in fact. The directorial board of a bank, which is its corporate government, and which for most legal considerations is in fact the corporation itself, is obliged to meet frequently, and to keep a close and constant supervision over the daily course and conduct of its business. In many species of corporations the position of director is almost a sinecure; the board constitutes only a sort of advisory body, which may meet only on comparatively infrequent occasions, to discuss large and important questions concerning the general business policy of the corporation. But it is not thus with banks. Their directors are bound to constant activity and thorough acquaintance with the daily course of the affairs and dealings of the institution. It is their duty to make this acquaintance so thorough that no officer can continue long and consistently to usurp a function of any degree of importance whatsoever without their knowledge. Unquestionably the public has a right to suppose that this board, which probably meets once or oftener in a week with the express duty of inquiring into the proceedings of the very few days which have intervened since the last convention, has an ordinarily accurate knowledge of how those proceedings are usually and uniformly conducted. This is an obvious duty of the board, and therefore strictly of the corporation; for the board is, in the eye of the law, the corporation. The community are entitled to assume that the board or corporation do their duty, and can hold the corporation liable for the results of their neglecting it. So if a board of bank directors suffer the assumption of a certain function by their cashier or teller to grow into a usage, it is not to be conceived that they could be heard to say that they had never had any knowledge of his conduct, and so shift the mischief of their own default upon the shoulders of an innocent third person. In other words, instead of its being necessary that the practice of the officer should have been brought to the *actual* knowledge of the government, it must suffice to show that such practice has continued so long and has been so public that it must have been brought to the knowledge of the government had not that body been unduly lax and careless in the performance of its duties.[28]

[28] Beers *v.* Phœnix Glass Co., 14 Barb. (N. Y.) 358; Smith *v.* Hull Glass Co., 11 C. B. 897, 9 Eng. L. & Eq. 442.

A board of bank directors, with responsibilities so much greater and duties so much more exacting than fall to the lot of directors in the majority of other species of corporations, must be very quickly estopped to deny their knowledge of any practice which grows up among their subordinates. In Minor *v.* Mechanics' Bank of Alexandria,[29] it was said that it is a presumption of law that the ordinary usage and practice of a bank, "in the absence of counter proof" results from regulations of the directors. What "counter proof" would be regarded as sufficient, or what species of evidence would be admissible as going to constitute "counter proof", is not intimated. But it would seem that law and justice would equally require that only evidence going to show that such was not in fact the ordinary usage and practice of the bank, or that the circumstances attendant upon it were not such as to give the public or the individual a conclusive right to regard such usage and practice as being established and binding, should be allowed. To allow the bank to show more than this, by way of "counter proof", would in effect be to enable them to make others suffer for their fault. The "interests of the mercantile world" should be imperative in this matter.[30]

Where one deals with a corporation in good faith, and the transaction is not *ultra vires*, and he is unaware of any defect or irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such, the corporation is bound, although such defect or irregularity really exists. Habitual exercise of powers by an officer with the knowledge and acquiescence of the bank defines as to the public his authority, if it is such as the directors could confer without violating the charter.[31] So far as the public are concerned, it is immaterial that such powers are contrary to a by-law.[32]

Where a bank president, by fraud and collusion between himself and the payee of a draft drawn on the bank, raised money dishonestly upon the draft by the wrongful use of his official powers, it was held that a *bona fide* indorsee for value of the paper might recover thereon from the bank.[33] So if negotiable paper be indorsed for accommodation solely, it is irregular, and even illegal;

[29] 1 Pet. 46, 7 L. ed. 47.

[30] Andrews *v.* Kneeland, 6 Cow. (N. Y.) 354.

[31] Merchants' Bank *v.* State Bank, 10 Wall. 604, 19 L. ed. 1008.

[32] Royal Bank *v.* Turquand, 6 Ellis & Black. 327; Agar *v.* Athenæum Ins. Co., 3 C. B. N. S. 725.

[33] Ridgway *v.* Farmers' Bank, 12 Serg. & R. (Pa.) 256.

and is of course an unauthorized and wrongful act on the part of the officer doing it. Yet if the indorsement of the negotiable paper of the bank is the proper function of this officer, the bank will be bound to the holder of this wrongfully indorsed paper, provided he came by it in due course of business, and without notice of the fact that the indorsement was for accommodation.[34] Though, by the principle already laid down, holding the taker to knowledge of the law provided he has knowledge of the facts, if he had been aware that it was solely an accommodation indorsement he could not have recovered on the ground that he did not know but that the officer might be authorized to make such. The absolute and necessary illegality, the impossibility of its being legal, except perhaps by virtue of special legislation, which no one can assume, is a principle of law which everybody is imperatively presumed to know. In this case none of the reasons given sometimes for holding parties to *ultra vires* acts exist.

Signing Contracts

(*m*) So with the ordinary statutory requisition that all formal contracts of the bank shall be signed by the president and cashier. The contracts must be first made by the directors, for power to sign is not power to make, and then only does the function of the president and cashier come in. They are authorized to sign contracts which have been thus previously entered into, but they are authorized to sign none others; for none others are in fact contracts of the bank. So, if they do sign others, it is an unauthorized exercise of a power or duty, which yet properly inheres in them. But it has been strongly intimated that their signatures should be regarded as conclusive of the validity of a contract, in favor of third parties affected thereby and ignorant of the irregularity lying behind this procedure, which, though irregular, has yet been done *prima facie* in strict pursuance of an existent function.[35]

(*n*) If the officer or agent of a corporation is clothed with a certain power, either by charter, statute, or by the lawful act of the corporation, and if he uses that power for an unauthorized or even prohibited purpose, or fraudulently, yet the corporation will be answerable for his action to any innocent third person

[34] Mechanics' Banking Association *v.* N. Y. Saugerties Lead Co., 23 How. Pr. (N. Y.) 74; Bank of Genesee *v.* Patchin Bank, 3 Kern. (N. Y.) 309; Kaiser *v.* U. S. National Bank, 99 Ga. 258, 25 S. E. 620 (1898).

[35] Gillett *v.* Campbell, 1 Den. (N. Y.) 520.

affected thereby.[36] Ordinarily, whenever the act is one not upon its face illegal, or in excess either of the general corporate powers, or of the powers which the officer undertaking it may legally exercise, and is held out as authorized to exercise, regularity is always presumed in favor of any person who had no notice contravening the correctness of these appearances.

§ 99. *Tenth.* **Adverse Interest.** — As between an agent and the bank an act will be without authority in any transaction in which A. has an interest adverse to that of B., unless B., with full knowledge of all the facts, authorizes or ratifies the act; for B. contracts for the disinterested skill and industry of A. for his own (B.'s) benefit, and the law, to protect him from all possibility of fraud, declares that no such transaction shall bind him as to A., whether A. has really gained by it or not. Thus all profits resulting from the agency belong to B., and an agent to sell cannot himself buy, nor if it is his duty to buy can he buy of himself.

But as to a third person C., B. may be held by a transaction in which A. is adversely interested, if C. was not aware of such defect, on the principle of inferred authority. (For illustration see chapter on Directors, § 114.)

The president and cashier of a national bank controlling its finances cannot use the bank's property in their private business, nor in general bind the bank by any contract to which either of them is a party.[1] And, by statute, they may be criminally

[36] Sheehan *v.* Davis, 17 Ohio St. 571; Madison & Indianapolis R. R. Co. *v.* Norwich Saving Soc., 24 Ind. 457; Barnes *v.* Ontario Bank, 19 N. Y. 152; Curtis *v.* Leavitt, 15 *id.*, 9; Leavitt *v.* Yates, 4 Edw. Ch. (N. Y.) 134; Stoney *v.* Amer. Life Ins. Co., 11 Paige (N. Y.) 635; Gillett *v.* Campbell, 1 Den. (N. Y.) 520; Kaiser *v.* U. S. National Bank, 99 Ga. 258, 25 S. E. 620 (1898); Chemical National Bank *v.* Armstrong, 59 Fed. 372; Wiggins *v.* Stevens, 33 App. Div. (Hun, N. Y.) 83 (1898); Murray *v.* Pauly, 56 Fed. 962.

[1] § 99. Rhodes *v.* Webb, 24 Minn. 292; Richards *v.* Bank, 26 Can. S. C. Rep. 381; Ruohs *v.* Bank, 94 Tenn. 71, 28 S. W. 303 (1894); Dowd *v.* Stephenson, 105 N. C. 467, 10 S. E. 1101 (1890); Merchants' Bank *v.* Denmere, 92 Ga. 735, 19 S. E. 38 (1893); Bank of Le Roy *v.* Purdy, 100 App. Div. 64 (1905), 91 N. Y. S. 310.

Where a bank holds a note upon which its president and another are sureties and takes a renewal note executed by the principal only, it is not bound by an undisclosed agreement between the president and his co-surety that the renewal note should discharge and extinguish the original. State Bank *v.* Mutual Telephone Co., 123 Minn. 314, 143 N. W. 912, 1915A Ann. Cas. 1082, n.

liable for making a loan to themselves beyond a specified amount.[1a]

In Bank *v.* Bradshaw it was held that a bank manager cannot lawfully loan the bank's money to a company in which as a stockholder he is largely interested, but, if he holds only a small amount of stock he is not liable for money so loaned if it may reasonably be presumed from the circumstances that his intent was solely to promote the interests of the bank.[2] And in North Carolina it has been held that where the president of a bank together with the cashier constitutes the discount committee, and the president indorses a note for value, before maturity, for his own benefit, the bank takes the note subject to all the equities by which the president was bound, the presumption being that his knowledge was that of the bank.[3]

§ 100. *Eleventh.* **Revocation.** — The clear principle of justice approved by the Roman law, and the jurisprudence of modern commercial nations, is that the bank, or the power appointing the agent, may revoke his authority at pleasure, but not to the injury of A. or any person, C., with whom A. has dealt as agent. Upon any contract not yet legally consummated, so as to be binding in law, the revocation operates fully; as to A. from the time he knows of it, as to C. from the time *he* knows of it,[1] or ought to know of it.[2]

If a transaction is partly executed, and is severable, the unexecuted part may be revoked. But if A. would be damaged by a revocation, it cannot be made without full indemnity to him, and C.'s acquired legal rights can never be affected by revocation.

An authority coupled with an interest, or given for a valuable consideration, cannot be revoked; but just what constitutes such interest is not perfectly clear on the authorities. Wilde,[3]

[1a] Thornton *v.* State, 5 Ga. App. 397, 63 S. E. 301 (1908).

[2] 16 Lower Can. Rep. 3.

[3] Le Duc *v.* Moore, 111 N. C. 516, 15 S. E. 888 (1892).

[1] § 100. An agency by writing revoked, but left in A.'s hands, and C. deals with him on faith of it, B. held. Beard *v.* Kirk, 11 N. H. 397.

[2] Salte *v.* Field, 5 Durn. & E. 211; Spencer *v.* Wilson, 4 Munf. (Va.) 130. A general notoriety is equal to notice; if the principal does what he can to prevent third parties from being misled, and to give notice of revocation as general as that of the agency was, it is sufficient.

[3] Smart *v.* Sandars, 5 C. B. (Eng.) 895, 917.

C. J., says, "An authority given on sufficient consideration for the purpose of securing some benefit to the donee of the authority is irrevocable" (except it may be by death, as the case shows was understood). Marshall,[4] C. J., says, "The interest that can protect a power fully during life (or after death of the one who creates it) must be an interest in the thing itself which is the subject of the agency, or power, and not merely in that which is produced by the exercise of the power."

§ 101. *Twelfth.* **Ratification.** — A bank may, in the same way as any other principal, ratify after performance unauthorized acts of its agents.[0] Such ratification [0a] may be direct, or it may be presumed from the ordinary circumstances which constitute practical ratification in the eye of the law; as, for example, from its receiving the benefit of the acts.[1] But where benefits are

[4] Hunt *v.* Rousmanier, 8 Wheat. 204, 5 L. ed. 597.

[0] § 101. A bank cannot ratify an agreement which it has no power to make, or where the law expressly forbids it. Swindell *v.* Bainbridge State Bank, 3 Ga. App. 364, 60 S. E. 480 (1907); Shaw *v.* Crandon State Bank, 145 Wis. 639, 129 N. W. 794 (1911).

[0a] A bank has the burden of proof to show that a contract made by its officers was not authorized or ratified. Ida Co. Savings Bank *v.* Johnson, 156 Iowa 234, 136 N. W. 225 (1912).

[1] Lime Rock Bank *v.* Macomber, 29 Me. 564; Hooker *v.* Eagle Bank, 30 N. Y. 83; Roe *v.* Bank of Versailles, 167 Mo. 406, 67 S. W. 303 (1902); Washington State Bank *v.* Dickson, 35 Wash. 641, 77 Pac. 1067 (1904); Shaw *v.* Crandon State Bank, 145 Wis. 639, 129 N. W. 794 (1911); Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228 (1910). A bank cannot repudiate a contract so that it continues to enjoy the benefits and escape the liabilities of the transaction. Owens *v.* Stopp, 32 Ill. App. 653; Wayne Title and Trust Co. *v.* Schuylkill Electric Ry. Co., 191 Pa. St. 90, 43 Atl. 135 (1899); Kendrick State Bank *v.* First National Bank, 206 Fed. 940 (1913). A lease which the cashier made without authority may be ratified. Spongberg *v.* First National Bank, 18 Idaho 524, 110 Pac. 716, 31 L. R. A. (N. S.) 736, 1912A Ann. Cas. 95. If the contract is ratified at all it must be in its entirety. National Citizens' Bank *v.* Bowen, 109 Minn. 473, 124 N. W. 241 (1910).

Accepting payment on a note is a ratification of the alteration of the date of the note by the manager. Bodine *v.* Berg, 82 N. J. L. 662, 82 Atl. 901, 1913D Ann. Cas., 721, n. Retaining the sum received by bank's vice president for extending the time of a note ratifies the same. Wyeloff *v.* Riverside Bank, 135 App. Div. 400 (1909), 119 N. Y. S. 937. Suing on a check paid by its cashier ratifies his act. Preston *v.* Dozier, 135 Ga. 25, 68 S. E. 793 (1910).

When the directors know that the cashier has loaned money of the bank to a speculative corporation in which he was a stockholder, and made no objection thereto until after five years' dealing with the corporation the bank will be held to have ratified the credit. First National Bank *v.* Gaddis, 31 Wash. 596, 72 Pac. 460 (1903).

received without full knowledge by the bank it does not constitute a ratification.[1a]

Any act done *avowedly* for the bank may be adopted with full actual knowledge of the facts, so as to have the *same effect as if previously authorized by the same power which ratifies*, except that such subsequent action can have no retroactive effect to establish duties, a compliance with which was not obligatory on C. at the time of the act, perhaps would have been unjustifiable on his part. (See § 90, above.) If the directors, or a majority of them, know actually, not merely constructively, of the contract, and acquiesce, it is a ratification without any vote.

If the act is ratified by a power which could legally have authorized it, all parties may of course be held upon it as a valid act. If the ratifier could not have given legal authority for the act, the adoption of course cannot render it any more valid than previous command could have done. The best law is, that no act of an agent beyond the authority his principal could rightfully give him shall be recognized as binding, although benefit received must be accounted for; but, as we have seen (§ 90), the cases are not agreed upon this.

One thing is clear, however, ratification by the board of directors makes the act their own, and that of the bank if previous authority from the directors would have made it so, and ratification by the bank makes the act theirs; whether it will bind them fully depends on other considerations than those with which this division is chiefly concerned. (See *Ultra vires*.) Some of the cases upon these points will now be more particularly noticed.

(*a*) It is a well settled rule, that a ratification by a principal of the unauthorized acts of an agent, in order to be effectual, must be made with a knowledge on the part of the principal of all the material facts. And the burden is upon the party who relies upon a ratification to prove that the principal, having such knowledge, acquiesced in and adopted the acts of the agent. It is not enough for him to show that the principal might have known the facts by the use of diligence.[2]

[1a] Fort Dearborn National Bank *v.* Seymour, 71 Minn. 81, 73 N. W. 724 (1898).

[2] Combs *v.* Scott, 12 Allen (Mass.), 493; Swindell *v.* Bainbridge State Bank, 3 Ga. App. 364, 60 S. E. 13 (1907); Coffee Springs Bank *v.* McGiloray, 167 Ala. 408, 52 So. 473 (1910); Baker *v.* Berry Hill Mineral Springs Co., 112 Va. 280, 71 S. E. 626 (1911); Campbell *v.* Manufacturers' National Bank, 67 N. J. L. 301, 51 Atl. 497, 91 Am. St. Rep. 438 (1902).

When the alleged principal is a corporation, a ratification may be shown by proving that the officers who had the power to authorize the act knew of it, and adopted it as a valid act of the corporation, although no formal vote was passed by them.[3]

It is incumbent upon the plaintiff to show that the directors, or at least a majority of them, knew of the contract, and its terms, and that with such knowledge they acquiesced in and adopted it.[4]

Constructive Knowledge not Enough

So where the cashier of a bank had been carrying on transactions with the bank contrary to its rules, for his own benefit, it was held that the fact of such transactions having been entered on the books of the bank did not import knowledge on the part of the directors, and consequent ratification.[5]

(*b*) A contract may be ratified by the stockholders of a corporation if it is made with full knowledge of all the material facts, although in ignorance of the legal effect of such facts.[6]

(*c*) Retention of the proceeds of the transaction renders the officer's act as binding as if expressly authorized.[7] The president of a bank in Nebraska which was about to be reorganized, professing to act on behalf of the bank, promised D. to give him ten shares of the stock if he would act as a director and would continue the dealings of his (D.'s) firm with the bank. D. was elected

[3] Sherman *v.* Fitch, 98 Mass. 59; Lyndeborough Glass Co. *v.* Massachusetts Glass Co., 111 Mass. 315; Kelley *v.* Newburyport Horse Railroad, 141 Mass. 496, 6 N. E. 745.

The foreclosure of a mortgage by entry and sale resulting from a vote of the board of investment is a ratification of a bank's treasurer procuring an assignment of a mortgage to a bank. Gerrity *v.* Wareham Savings Bank, 202 Mass. 214, 88 N. E. 1084 (1909).

[4] Murray *v.* Nelson Lumber Co., 143 Mass. 251, 9 N. E. 634.

Specific acts of ratification ought to be alleged and proved. Swindell *v.* Bainbridge State Bank, 3 Ga. App. 364, 60 S. E. 13 (1907).

[5] First National Bank of Fort Scott *v.* Drake, 29 Kan. 311; citing Citizens' National Bank *v.* Elliott, 55 Iowa 104, 7 N. W. 470.

[6] Kelley *v.* Newburyport Horse Railroad, 141 Mass. 496, 6 N. E. 745.

[7] People's Bank of Belleville *v.* Manufacturers' National Bank, 101 U. S. 181, 25 L. ed. 907 (1879); Third National Bank *v.* St. Charles Savings Bank, 244 Mo. 554, 149 S. W. 495; Cantrell *v.* Davidson, 180 Mo. App. 410, 168 S. W. 271 (1914). When a bank affirms an act by retaining money it necessarily assumes the knowledge that its agent had in doing the act. Fairfield *v.* Southport National Bank, 80 Conn. 92, 67 Atl. 471 (1907); and the bank is estopped to deny the authority of its officers in pledging assets for the loan. First National Bank *v.* State Bank, 15 N. D. 594, 109 N. W. 61 (1906); or in collecting draft against shipment of gold. First National Bank *v.* Bakken, 17 N. D. 224, 116 N. W. 92 (1908).

director by the bank, which thus held him out as owning ten shares at least, for that is required by R. S. § 5146 as a qualification, and on the bank list of shareholders D. was down as owner of ten shares. The court held that there was sufficient consideration for the contract to *give* D. the shares, (it appeared that D.'s firm was about to withdraw its business from the bank,) and that, as the president avowedly acted for the bank, and the latter had received the benefit of the transaction, it had ratified his action.[8]

Where a majority of the directors of a bank make an informal agreement to take the assets and assume the liabilities of a private banking business, and the corporation thereupon takes and retains such assets under the agreement, it will be held to have ratified the action of the directors, and to be bound by all the terms of the agreement.[9]

(*d*) A cashier accepted a note in payment.[9a] He had no authority to do so, but a ratification was inferred from the directors' approval of it in connection with an entry of " paid " in a certain book showing the transaction, which was submitted to them.[10]

The president of bank A. instructed its correspondent bank, B., to charge against A. the amount of a private note of his held by B. An account was rendered showing the transaction, which was accepted by A. *Held*, that A. was estopped to deny the correctness of the charge, as was also its receiver.[11]

(*e*) When a bank brings suit upon a bond taken by its cashier it ratifies his act in connection with the bond.[12]

[8] Rich *v.* State National Bank of Lincoln, 7 Neb. 201.

[9] Bank of New London *v.* Ketchum, 64 Wis. 7 (1885).

[9a] A bank may ratify the act of its cashier in attempting to pay his own debt to the bank by his acceptance, as cashier, of the note of a third party. First National Bank *v.* Gunhus, 133 Iowa 409, 110 N. W. 611, 9 L. R. A. (N. S.) 471, n. (1906).

[10] Ecker *v.* First National Bank of New Windsor, 59 Md. 291 (1882).

[11] Burton *v.* Burley, 9 Bissell 253 (Ill., 1880). See Pensacola etc. Bank *v.* National Bank, 59 Fla. 347, 52 So. 294 (1910).

[12] German-American Bank *v.* Schwinger, 178 N. Y. 569, 70 N. E. 1099 (1904), affirming 75 App. Div. 393 (1902), 78 N. Y. S. 38. See also Warren Deposit Bank *v.* Maryland Fidelity etc. Co., 116 Ky. 38, 74 S. W. 1111 (1903), acceptance of a fidelity bond; Bodine *v.* Berg, 82 N. J. L. 662, 82 Atl. 901, 1913D Ann. Cas. 721, 40 L. R. A. (N. S.) 65, acceptance of payments and assignment of note altered by bank's general manager; German Sav. Bank *v.* Des Moines National Bank, 122 Iowa 737, 98 N. W. 606 (1904); Preston *v.* Dozier, 135 Ga. 25, 68 S. E. 793 (1910), bringing suit on a note; Selma Sav. Bank *v.* Harlan, 167 Iowa 673, 149 N. W. 882 (1914), suing on a note; German-American Bank *v.* Schwinger, 75 App. Div. 393 (1902), 78 N. Y. S. 34.

Agent Responsible to Bank

§ 102. **Tort.** — An agent, A., is responsible to the bank for all damage [0] occasioned to the bank by tortious conduct not commanded or ratified by the bank; and the order of a superior officer is no excuse, if A. has notice of the wrongful character of the act.[1]

Agent Responsible to Third Person

(*a*) An agent is responsible to a third person, C., for misfeasance or positive wrong, always, whether the bank is also responsible or not [1a]; but for A.'s negligence or omission *in the course of his agency*, C. must look to the principal.

Bank Responsible to Agent

(*b*) The bank is responsible to its agent for injury resulting from *its own* negligence or wrongful conduct, but not for that resulting from the negligence or fault of properly selected fellow servants; for this danger is within the contemplation of the parties at the time of the contract for service, and may be supposed to be allowed for in the compensation, and is as likely to be known to and is as easily guarded against by A. as by B., or perhaps more easily.[2] But if A. is injured by the tort, not of a *fellow* servant, but of one in command over him, the best opinion is that the corporation is liable to A. as it would be to a third party.[3]

[0] § 102. Jones *v.* Johnson, 86 Ky. 543 (1888).

[1] Minor *v.* Mechanics' Bank, 1 Pet. 46, 7 L. ed. 47; Pendleton *v.* Bank of Kentucky, 1 T. B. Mon. (Ky.) 177.

[1a] State *v.* Commercial Bank, 37 Neb. 174, 55 N. W. 640 (1893); Porter *v.* Sherman Bank, 36 Neb. 271, 54 N. W. 424 (1893); Williams *v.* McKay, 46 N. J. Eq. 25, 18 Atl. 824; Minton *v.* Stahlman, 96 Tenn. 98, 34 S. W. 222 (1895); Cooper *v.* Hill, 94 Fed. 582 (1899); Dodd *v.* Wilkinson, 42 N. J. Eq. 647, 9 Atl. 685 (1887); Barth *v.* Graf, 101 Wis. 27, 76 N. W. 1100 (1898); Cockrill *v.* Abeles, 86 Fed. 505 (1898).

An officer is liable for deposits received after he knows the bank is insolvent or in failing circumstances. State *v.* Oleson, 35 Wash. 149, 76 Pac. 686 (1904).

[2] As this is a point on which the cases are not uniform, authorities are quoted only. Harrison *v.* Central R. R. Co., 2 Vroom (N. J.) 296; Snow *v.* Housatonic R. R. Co., 8 Allen (Mass.) 441; Farwell *v.* Boston & Worcester R. R. Co., 4 Met. (Mass.) 49.

[3] Cleveland, etc. R. R. Co. *v.* Keary, 3 Ohio St. 201; citing Dixon *v.* Ranken, 1 Am. R. R. Cas. 569 (Scotch case); Hayes *v.* Western R. R. Co., 3 Cush. (Mass.) 270.

Bank Responsible to Third Person

(*c*) The bank is not responsible to a third party for loss *remotely* caused by its negligence, as where felony intervenes, nor if such party has deprived himself of the right to redress by his own *contributory* fault, nor when the loss is occasioned by an act of A. entirely outside the business of his agency.[3a]

Grounds of Liability in Tort

The grounds of liability for tort are, 1st, causation, 2d, adoption, and, 3d, such position of control as gives the best opportunity of guarding against the injury.[4] Every one must so conduct his affairs as not to damage another by any action or omission, whether he does the business himself or by an agent, unless the conduct causing loss is clearly recognized as so necessary for the good of society that it must be sustained, even though producing damage to some individual, in which case it is set down as *damnum absque injuria.*

General Rule. Ultra Vires

Upon these grounds a bank is liable for damage directly and naturally resulting (1) from the *nature* [5] of an act ordered by itself or its general directions, or (2) from the act of an agent which in-

[3a] Hansford *v.* National Bank, 10 Ga. App. 270, 73 S. E. 405 (1912). When a bank agreed to make a loan against certain collateral it was entitled to turn over the borrower's note and collateral to an officer of the bank who personally made the loan, and the bank is not liable for any conversion of the collateral by such officer. McKinnon *v.* Western Development Co., 212 Fed. 702 (1914).

[4] For example, a railroad company is held as an insurer because it can best guard against danger and loss, and because it would be extremely difficult for the owner of goods to prove embezzlement or other actual fault or negligence; and holding the company to such liability saves much litigation and intricate and costly inquiry, and works no injustice for the extra risk to company, and security to the customer is allowed for in the compensation for the company's service. See C. J. Shaw's opinion, in Farwell *v.* Boston & Worcester R. R. Co., 4 Met. (Mass.) 49. In the case of a bank, it is not generally deemed necessary to carry responsibility beyond the consequences of its own conduct, and that of its agents acting in its business and *under its control.* There is a possible exception in the case of collections by a correspondent bank. See § 264. Generally the question is, who has the efficient control, on whose account, for whose benefit, and under whose orders is the business done, the conduct of which occasions the loss.

[5] Peachey *v.* Rowland, 16 E. L. & E. 442; Rex *v.* Nutt, Fitzg. 47.

volves a breach of the duty of the bank,[6] or (3) from the manner in which any agent performs the functions of his office, or any business that he may expressly or impliedly be authorized to do, whether it be malfeasance,[6a] nonfeasance,[6b] or negligence that causes the damage. (4) And a tort, like a contract, can be adopted. If the bank or the board of directors expressly adopt and ratify the act, or knowingly retain the benefit of it, or in some cases the services of the wrongdoer, it will make the tortious conduct that of the bank, and it makes no difference how clearly *ultra vires* the act may be, except as bearing upon (3) or (4) by showing the original act or the adoption not to be within the course of the agency of the officer or board.

If the board of directors order or ratify an act which is entirely outside the business of the bank, or the handling of its interests and property, it is not the bank's tort;[6c] but if they publish a libel or fraudulent statements[7] in the corporate reports, the bank is liable, as it would probably be for assault and battery if the paying teller should attempt forcibly to recover an overpayment,[8] or the cashier should break the peace in attempting to seize the property of C. in payment of his debt to the bank.

Wilfulness not the Test

In some cases it has been said, that, although the principal is liable for the agent's tort in the *bona fide* prosecution of his master's

[6] Weed *v.* Panama R. R. Co., 17 N. Y. 362; Philadelphia R. R. Co. *v.* Derby, 14 How. 468, 14 L. ed. 502; Sinclair *v.* Pearson, 7 N. H. 227.

If the receiving teller, while acting for the bank, converts the depositor's money, the bank is liable; but if the act is done independently of employment, the bank is not liable even though the teller was at the time in the bank's employ. Schuck *v.* Bramble, 122 Md. 411, 89 Atl. 719 (1914).

[6a] Second National Bank *v.* Howe, 40 Minn. 390, 42 N. W. 200.

[6b] An unauthorized action of the directors of a bank in withholding assets and the transfer of stock to a purchaser thereof and thus preventing him from selling the stock before the insolvency of the bank became known is not in itself evidence of fraud on the purchaser. Penfold *v.* Charlevoix Sav. Bank, 140 Mich. 126, 103 N. W. 572 (1905).

[6c] The board of directors and others are impotent to ratify any act *ultra vires* in its nature, *e.g.* instituting prosecutions for violation of the public criminal laws of the state, or causing requisition papers to be issued for alleged criminals. Hansford *v.* National Bank, 10 Ga. App. 270, 73 S. E. 405 (1911); Roberts *v.* National Bank, 10 Ga. App. 272, 73 S. E. 407 (1911).

[7] Cullen *v.* Thomson, 4 Macq. H. L. Cas. (Sc) 431, 9 Jur. (N. S.) 85.

[8] Ramsden *v.* Boston & Albany R. R. Co., 104 Mass. 117.

business, yet he is not responsible for the agent's wilful [9] act, — that the wilfulness of the act is the determining fact. But it is perfectly clear that in many cases, if not all, the line is not drawn in that way, and that wilfulness is of import only as expressing the fact that the agent stepped aside [10] deliberately from the conduct called for by his agency. If the damage really results from the doing of any act which is really, or upon the facts as known to A.[11] is properly inferred to be, within the scope of A.'s duties as agent, the bank is liable. And even where the principal has given instructions to A. not to do the act, yet, if it is done by him in the course of the regular business of his office, B. is liable.[12] This of course is not consistent with the idea that wilfulness excuses the principal. It is impossible to reduce the cases to anything like harmony, except upon the theory that B. is responsible for all torts, whether wilful or not, which involve a breach of B.'s duty, or result naturally from B.'s orders, or arise from the manner in which A. performs the duties which he has actual or implied authority to do. Except as regards a notary or correspondent bank, the whole matter of a bank's responsibility for tort reduces itself to express authorization, ratification, and control. The responsibility of B. for A. for tort in the course of business grows out of and is measured by, begins and ends with, his control of A.,[13] and therefore does not cover the act of one exercising an independent calling who has contracted to do the work,[14] unless the injury results from the *very nature* of the thing contracted for. In that case, the bank is responsible as the cause of loss.

The following decision of the United States Supreme Court, in a suit against a corporation for libel, presents the law clearly.

" A railroad corporation was held responsible for the publication by them of a libel, in which the capacity and skill of a mechanic

[9] M'Manus *v.* Crickett, 1 East 106; Thayer *v.* Boston, 19 Pick. (Mass.) 516; Davis *v.* Bangor, 42 Me. 522; Watson *v.* Bennet, 12 Barb. (N. Y.) 196; Wright *v.* Wilcox, 19 Wend. (N. Y.) 343; Fox *v.* Northern Liberties, 3 Watts & S. (Pa.) 103.

[10] *Fraud. Trespass vi et armis.* Weed *v.* Panama R. R. Co., 17 N. Y. 362; Ranger *v.* Great Western R. R. Co., 5 H. L. Cas. 72; Bloodgood *v.* Mohawk R. R. Co., 14 Wend. (N. Y.) 51; Edwards *v.* Union Bank of Florida, 1 Fla. 136. See case of the Druid, 1 Wm. Rob. 405; and Reeves's Dom. Rel. 357.

[11] Goff *v.* Great Northern Railway, 30 L. J. Q. B. 148.

[12] Philadelphia & Reading R. R. *v.* Derby, 14 How. 468, 14 L. ed. 502; Southwick *v.* Estes, 7 Cush. (Mass.) 385.

[13] McGuire *v.* Grant, 1 Dutch. (N. J.) 356.

[14] 9 M. & W. 710; 5 Exch. 721.

and builder of depots, bridges, station-houses, and other structures for railroad companies, were falsely and maliciously disparaged and undervalued. The publication in that case consisted in the preservation, in the permanent form of a book for distribution among the persons belonging to the corporation, of a report made by a committee of the company's board of directors, in relation to the administration and dealings of the plaintiff as a superintendent of the road.

" For acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business, and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances.

" The result of the modern cases is, that a corporation is liable *civiliter* for torts committed by its servants or agents, precisely as a natural person; and that it is liable as a natural person for the acts of its agents done by its authority, express or implied, though there be neither a written appointment under seal, nor a vote of the corporation constituting the agency or authorizing the act." [15]

(*d*) A bank is not generally held responsible for the negligence of a notary public in the performance of his duties,[16] unless it makes the notary peculiarly its agents by appointing him to act for it for a definite time, and taking bond for his faithful performance of duty,[17] and even then opinion is not uniform that the bank is liable.[18]

The ground of this rule is that the notary is an officer whose

[15] Philadelphia, Wilmington, & Baltimore R. R. *v.* Quigley, 21 How. 202, 16 L. ed. 73. See also Salt Lake City *v.* Hollister, 118 U. S. 256, 260, 30 L. ed. 176, 6 Sup. Ct. 1055; New Jersey Steamboat Co. *v.* Brockett, 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. 1039; National Bank *v.* Graham, 100 U. S. 699, 702, 25 L. ed. 750; Hyre *v.* Central Bank, 48 Mo. App. 434.

Bank is liable for injury to one relying upon false statements in certificates issued by its cashier in respect to deposits. Hindman *v.* First National Bank, 112 Fed. 931, 57 L. R. A. 108 (1902).

When the officers of a bank aided gangsters they and the bank are liable to the defrauded party, there being no innocent stockholders to suffer. Hobbs *v.* Boatright, 195 Mo. 693, 93 S. W. 934, 113 Am. St. Rep. 709, n., 5 L. R. A. (N. S.) 906, n. (1906).

[16] Britton *v.* Niecolls, 104 U. S. 757, 26 L. ed. 917; First National Bank of Galveston *v.* Butler, 41 Ohio St. 519; Baldwin *v.* Bank of Louisiana, 1 La. Ann. 13.

[17] Warren *v.* Suffolk Bank, 10 Cush. (Mass.) 582; Gerhardt *v.* Boatman's Savings Inst., 38 Mo. 60.

[18] Baldwin *v.* Bank of Louisiana, 1 La. Ann. 13. See Title, "Notary Public", § 264.

duties are prescribed by law (and in most States an official bond is required to secure the public against his negligence, and this should be the case in all States), and as this ground does not apply to giving *notice of dishonor*, that not being a duty peculiarly belonging to a notary, but capable of being done by any agent of the bill holder, the bank is not relieved of responsibility for its proper performance by employing a notary to do it.[19]

Correspondent Bank in Collection

As we shall see hereafter, there is much conflict on the point whether a bank is to be held responsible for the negligence of a correspondent bank to which paper is sent for collection. (§ 264.)

Cases on Negligence. Tort beyond Scope of Official Business

(*e*) We may here notice a few cases upon the liability of a bank for negligence. The elaborate, thorough, and luminous opinion delivered by Parker, C. J., in the case of Foster *v.* The Essex Bank,[20] stands forth as the leading authority. The facts in this well known case were as follows. A cask of gold doubloons was left with the bank for safe keeping, the circumstances of its reception constituting, in the opinion of the court, a purely gratuitous bailment. It was kept in the bank vaults with precisely the same care with which the funds and property of the bank were kept. But the cashier of the bank, with the connivance of a subordinate clerk, stole from the vaults a quantity of bank property, and also a considerable amount of this gold. It was no part of the duty of either the cashier or clerk to open or meddle with the keg in which the doubloons had been secured by their depositor; and no officer of the bank had, from the nature of the mandate, any right to examine or so much as touch the contents of the keg. The counsel for the plaintiff urged that the principal was liable for the tortious act of its agent, the cashier. But the court said, upon the authority of Mechanics' Bank *v.* Bank of Columbia,[21] that the liability of the principal depends upon the facts, (1) that the act was done in the exercise, and (2) within the limits, of the power delegated. For example, for money credited in the books

[19] Allen *v.* Merchants' Bank, 22 Wend. (N. Y.) 215.

[20] 17 Mass. 479, followed in Giblin *v.* McMullen, 2 L. R. P. C. 317, and in Scott *v.* National Bank of Chester Valley, 72 Pa. St. 471.

[21] 5 Wheat. 326, 5 L. ed. 100.

of the teller, or proved to have been deposited with him, though not credited, the bank is answerable. The inquiry then, in this case, must simply be, whether, when the gold was taken from the cask by the cashier and clerk, they were in the course of their official employment. Their master, the bank, had no right to meddle with or to open the cask; it neither could delegate, nor did it attempt to delegate, any authority to any of its officers so to do. It was not within the duty of the cashier to know, or to take any account of, the contents. He was not therefore acting within the scope of his authority when he committed the villainy; and the bank is no more answerable than if he had stolen the pocket-book of an individual from the bank counter. "If, then," the learned judge proceeds, "it be asked, for what acts of a cashier or clerk the bank would be answerable, I should answer: for any which pertain to their official duty; for correct entries in their books, and for a proper account of general deposits; so that, if by any mistake, or by fraud, in these particulars, any person be injured, he would have a remedy.[22] . . . For the correct conduct of all their servants, in their proper sphere of duty, they are answerable." In this especial case, "if the cashier had any official duty to perform relating to the subject, it was merely to close the doors of the vault when banking hours were over," but neither to open the keg, nor to touch its contents. The bank is "not answerable for special deposits, stolen by one of their officers, any more than if stolen by a stranger; or any more than the owner of a warehouse would be, who permitted his friend to deposit a bale of goods there for safe keeping, and the goods should be stolen by one of his clerks or servants."

Banks do not Warrant the Honesty of Their Officers beyond Their Duties

(*f*) "The undertaking of banking corporations with respect to their officers is, that they shall be skillful and faithful in their employments: they do not warrant their general honesty and uprightness. And it is the same with individuals." [23] The cited

[22] To the point that the bank is liable for frauds or mistakes of the cashier or clerk in their entries in the books of the bank, and in false accounts of deposits, may be cited also Salem Bank *v.* Gloucester Bank, 17 Mass. 1; Gloucester Bank *v.* Salem Bank, *id.*, 33; Andrews *v.* President, etc. of Suffolk Bank, 12 Gray (Mass.) 461.

[23] Citing Finucane *v.* Small, 1 Esp. 315.

case of Finucane *v.* Small " is in all respects like the one before us, except that the goods were to be kept for hire," a difference altogether in favor of the present defendants. In answer to this case, it was observed in argument that " the cashier of the bank was trusted, and therefore the doctrine of Lord Kenyon did not apply. But, if we are right in the principles before stated, he was not trusted in this business; neither he nor his principal, the bank, having anything to do with the chest or cask but to give it a place in the vault, and to lock it up when the hours of business were over; and so the cashier must be considered like the servant in the case cited."

Negligence of Directors

(*g*) It was acknowledged by the counsel for the bank, in this case, that a more difficult question would have been presented had the board of directors, or their predecessors, shown any negligence in the original appointment or the subsequent retention of the defaulting officials. Had these persons borne bad characters, or had circumstances of suspicion demanding inquiry come to the knowledge of the board, or had the board for any reason been unwilling to trust their own property with them in the same manner in which they trusted the property of the bank, then the plaintiff might have had a better case. No adjudicated cause aids us in determining what redress, if any, the law would allow to the sufferer who had lost a special deposit under such circumstances of additional aggravation. An opinion must be matter of speculation. Very probably he might be allowed to recover. But if he were, it is obvious that his action could not, as in this case, be *assumpsit*. It should be an ordinary action on the case for damages, laying an injury or loss directly resulting from the wrongful default of the corporation. The chief difficulty in the way of the plaintiff's success in such a suit would probably be in showing that the default of the directors was in fact the *causa proxima* of his mishap. It would of course be easy to show that it facilitated the occurrence of the mishap, but the only immediate cause in the eye of the law might perhaps be regarded as the felony of the officials.

Trunk Case

(*h*) There is an English case of very similar facts and law,[24] and also another English case is to the same effect, going, however,

[24] Giblin *v.* McMullen, 2 L. R. P. C. 317.

even further. The customer kept his trunk of securities with his bankers, and one of the bankers himself obtained access to the trunk, and abstracted securities therefrom. It was held that the customer could have recourse for reimbursement only against the estate of the guilty partner, not against the property of the firm; inasmuch as it did not appear that *the firm* had any authority to open the trunk or examine its contents.[25] Apparently, if the firm had had such authority, the act of the individual partner in reaching the securities, being thus within the scope of this authority as a partner, would have subjected the firm to responsibility for his wrongful act, done within the scope of this authority.

But where the customer deposited with his bankers certain certificates of stock for the purpose of having the dividends collected by the bankers for his account, paying them a small commission for their trouble, and the manager fraudulently abstracted the certificates and by forged transfers got possession of the stock, the customer was allowed to recover the value of the stock from the company, but without costs. He then sought to collect the costs from the bankers. The court held that the bankers were bailees for reward, and had been guilty of culpable negligence in keeping the certificates in a safe to which the manager had such uncontrolled access; but nevertheless that the plaintiff could not prevail in this suit, since the loss of his costs was too remote a consequence of the negligence of the bankers to permit of their being held liable.[26]

If the bankers themselves are guilty of a misappropriation of property deposited with them for a special purpose, it seems hardly necessary to say that they will be liable.[27]

Bank not Responsible for Remote Result of its Negligence. Stolen Bills

(*i*) Upon this point the same seventeenth volume of the Massachusetts Reports, which is peculiarly rich in interesting and ably argued bank cases, contains a valuable decision. The facts of the case of The Salem Bank *v.* The Gloucester Bank[28] were as follows. A large number of the bills or notes of the bank were prepared for circulation, and were signed by the cashier. They

[25] *Ex parte* Eyre, 1 Phil. Ca. 227.
[26] *In re* United Service Company, *Ex parte* Johnston, 6 L. R. Ch. 212.
[27] *Ex parte* Bond, 1 M. D. & De G. 10.
[28] 17 Mass. 1.

only needed for their perfection the signature of the president. This, however, they did not receive, and they were kept in this condition for several years, lying in the cashier's desk in the open room of the bank. Thieves broke into the bank, and attempted to break its vault without success. But they broke open the desk and stole the incomplete bills, forged the president's signature upon them, and put them in circulation. The holders sought to recover, among other pleas, under a declaration for damages, alleging that their loss was the result of the excessive and wrongful negligence of the bank in allowing notes so nearly perfect to lie in so exposed a place. Of course no business man could deny that, practically, the manner in which these notes were kept was unpardonably careless. Had they been in the vault, it was practically proved that they would have remained intact, since the vaults were not opened. But the plaintiffs were not allowed to recover. The court said that for the "indirect and remote consequences of the negligence" the corporation was not answerable. They did not leave finished notes in this exposed condition, but only paper which required the further and independent act of forgery, an act which is a felony, to make them capable of working a deception. The neglect was only *causa remota*, and the bank could not be held. The decision is clearly reasoned and perfectly satisfactory in law. Unfortunately, its value is rather negative than positive, for it furnishes very little aid towards the determination of what species of directorial negligence the results would be regarded as sufficiently immediate to be answered for by the bank. It should perhaps be remarked that it was not intimated in this case that the directors had been in any default in choosing or keeping a cashier whose character they ought to have known to be such as to render him unfit for the responsibility imposed upon him.

(*j*) It is a general rule, that, except under very peculiar circumstances, a bank will not be held liable to make good such acts or undertakings of their officers as are unwarrantable, unusual, or indirectly in contravention of any law.[29]

[29] Wyman *v.* Hallowell & Augusta Bank, 14 Mass. 58; where the question was whether a bank could be bound to pay the bank notes and bills of its predecessor, of the same name, by reason of promises to that effect made by its president and cashier. Lloyd *v.* West Branch Bank, 15 Pa. St. 172; where the cashier had received, without consideration, a bundle of notes "the issuing of which had been interdicted" by a statute. Foster *v.* Essex Bank, 17 Mass. 479.

(*k*) A bank is liable, if negligent in failing to examine bonds received by it for a correspondent, as collateral for a loan, although the bank acts gratuitously.[30]

When the president of a bank leaves certificates of stock signed in blank, with its cashier who fraudulently issues them to himself and pledges them as collateral for a loan, the bank is liable to the pledgee for the value of the stock even though the certificate recites that they are transferable only on the books of the bank.[31]

A bank is liable to the fiancée of its cashier when he, acting for the bank, practices fraud upon her through advantage of the relationship between them.[32]

Although a bank may legitimately receive on deposit the money of a gambler, with reason to believe it was won in gaming, yet, when, with conscious knowledge that the depositor is obtaining the money by fraud or theft, it does acts in aid of the means by which the money is thus obtained, it is liable therefor.[33]

§ 103. **Representations.** — An agent, A., cannot indirectly by declarations make a contract for the bank (B.), which he could not make directly, nor ever affect B. by his representations or admissions beyond the scope of the business for which he has actual or inferred authority.[0]

But if A. has authority to make a declaration, expressly or by usage, or by implication, as from his acting in an office in which such authority inheres, or if the course of transacting business for the bank with C., for which he has actual or inferred authority, he makes declarations pertinent to that business, such statements are as to C. the statements of the bank, and affect it just as they would if made by a principal transacting the business for himself, viz.: 1st, if material (*i.e.* (*a*) enter substantially into the inducement to C.'s conduct in the matter), and are such as he has a right to rely upon (*i.e.* (*b*), not mere expressions of opinion, or recom-

[30] Clinton National Bank *v.* Park National Bank, 37 App. Div. (Hun, N. Y.) 601 (1899).

[31] Havens *v.* Bank of Tarboro, 132 N. C. 214, 43 S. E. 639, 95 Am. St. Rep. 627 (1903).

[32] Hallett *v.* Fish, 120 Fed. 986 (1903).

[33] Wright *v.* Stewart, 130 Fed. 905 (1904); Stewart *v.* Wright, 147 Fed. 321 (1906).

[0] § 103. Franklin Bank *v.* Stewart, 37 Me. 519; Kennedy *v.* Otoe Co. Bank, 7 Neb. 65. See Washington Bank *v.* Lewis, 22 Pick. (Mass.) 24; Lloyd *v.* West Branch Bank, 15 Pa. St. 172; Merchants' Bank *v.* State Bank, 10 Wall. 675, 19 L. ed. 1028; Thomas *v.* City National Bank, 40 Neb. 501, 58 N. W. 943 (1897); Rich *v.* State National Bank, 7 Neb. 201.

mendation, or (*c*) statements regarding matters equally within the knowledge of C., or (*d*) of the falsity of which C. has notice), (*e*) and made not in jest, but in such manner as naturally to influence C., and therefore presumably made with that intent, (*f*) and C. does actually rely upon them, and sustains damage thereby, the bank is liable for deceit if the statements were false to the (*g*) knowledge of the officer, or made without such reason for belief as a man of ordinary prudence would require for his own guidance, or C. may upon such cause rescind his contract.[1] 2d, if made *during* (not after) the negotiation for sale of goods with the qualities (*a*), (*b*), (*e*), and (*f*), it is a warranty if so intended and understood by the parties.[2] If (*g*) is present, it is a warranty and also a fraud. If made in good faith, it is still a warranty. If, however, it was intended only as a bare affirmation, it is a representation, not a warranty.[3] Any affirmation of the *quality or condition* of the goods with the above limitations (*a*), (*b*), (*e*), and (*f*), is a warranty.[4] 3d, the declaration or admission may amount to a contract or the renewal of one, as when a cashier declares a check drawn on his bank to be "good",[5] or when the president, having power by usage, takes a debt out of the Statute of Limitations by his acknowledgment.[6]

C. must be careful not to rely upon A.'s representations until assured that he has either authority for the very purpose of making them, or authority to do the business to which they are pertinent, and in the course of which they are made; he must never take an agent's own representations as to the extent of his authority.[7]

Past Transactions

As a general rule, information as to a past and completed transaction is courtesy, and no more; but if the knowledge has a bearing

[1] See Kerr on Fraud and Mistake; Prewitt *v.* Trimble, 92 Ky. 176, 17 S. W. 356 (1891).

[2] Bacon *v.* Brown, 3 Bibb (Ky.) 35 Davis *v.* Meeker, 5 Johns. (N. Y.) 354; Roscorla *v.* Thomas, 3 Q. B. 234.

[3] Swett *v.* Colgate, 20 Johns. (N. Y.) 196; Conner *v.* Henderson, 15 Mass. 320.

[4] Hillman *v.* Wilcox, 30 Me. 170; Beals *v.* Olmstead, 24 Vt. 115; Osgood *v.* Lewis, 2 Harr. & G. (Md.) 495.

[5] Espy *v.* Bank of Cincinnati, 18 Wall. 604, 21 L. ed. 947.

[6] Morgan *v.* Merchants' National Bank of Memphis, 13 Lea (Tenn). 234.

[7] Farmers & Mechanics' Bank *v.* Butchers & Drovers' Bank, 16 N. Y. 125.

on a present or future dealing with the bank, it will come within the sphere of liability as above, at least if matter to which it is material, or the effect of the statement upon such dealings may be supposed fairly within the contemplation of the parties.

(*a*) Some cases in illustration will be noticed. In the Farmers and Mechanics' Bank of Kent County *v.* Butchers and Drovers' Bank,[8] the teller, duly authorized to certify a check if the drawer had funds in the bank, certified the check of a drawer who had no funds. The certification under the circumstances was clearly unauthorized; but the holder had no notice of the facts which rendered it so. Mr. Justice Selden, delivering the opinion in the New York Court of Appeals, said in substance: The bank leads persons to put confidence in its teller, through whom they are obliged to deal with the bank. For his acts, therefore, within the scope of his employment and authority, so far as can be known, the bank must be responsible. Here the fact of whether or not there were funds was one which could only be learned by asking the teller himself. Knowledge that he could not certify without funds is not knowledge of the extrinsic fact that there are no funds. A check, taken on the faith of the officer's representation that he has *authority to certify*, does not bind the bank, if he had really no such authority. But, provided he has the authority, then a check taken on the strength of his representation that there are funds binds the bank, unless the holder knows as a fact that the representation is false. The sound rule seems to be, that, where a party dealing with an agent ascertains that the agent's act corresponds exactly with the terms of the power, he may take the agent's representation as to any *extrinsic fact*, peculiarly within the agent's knowledge, and not ascertainable by a comparison of the power with the act done under it. The distinction is clear, and is well put by the learned judge. The bank does not hold out the officer as authorized, and he is not authorized, to state what are or are not his proper functions. But all his acts, however irregular or fraudulent, done in pursuance of a function which, as a matter of fact, the bank has in any manner made properly his, must affect the bank, if the party dealing with him acted in good faith. To the like effect was the holding in *Ex parte* Overend, Gurney, & Co.[9] Acceptances made by an officer duly authorized to accept upon the receipt of collateral security, but who in this instance had accepted without such receipt, were holden good as against the

[8] 16 N. Y. 125.

[9] L. R. 4 Ch. 460.

bankers in the hands of a third party, holding for value and ignorant of the facts which had rendered the acceptance really irregular and unauthorized.

Since the power of selling railroad bonds does not pertain to a bank organized under the act of Congress of 1864, if a bank undertakes so to sell, and the teller makes false representations to a purchaser, no action will lie for the purchaser against the bank to recover damages for the deceit.[10]

Declarations and admissions of the officer or agent of a bank bind the bank only when they are made by him officially, with the intent of binding the bank, and either within the scope of his general official employment, or by virtue of a special authority lodged in him by the directors. Otherwise, like the remarks of any third person, they are utterly incompetent.[11] The declarations of directors, even more than those of other officers, are impotent to bind the bank; for the reason that no individual director, as such, has any power whatsoever in reference to the affairs of the bank.[11a] Only when and as he is acting in conjunction with his co-directors is he intrusted with what may be described as an undivided share in the general administration of its affairs. But to him individually, at least strictly in his capacity as director, no department of those affairs is allotted, and his sole admission or declaration in any department is therefore in excess of both his duty and his authority, and is null and meaningless in law.[12]

Past Transactions

(*b*) As a general rule statements made by a bank officer concerning any past transaction, though the matter to which they refer is one which falls within the scope of his employment, will not be regarded as binding upon the bank. They are considered to be given simply as a matter of favor to the inquirer. The officer

[10] See also the cases of Atlantic Bank *v.* Merchants' Bank, 10 Gray (Mass.) 532; Skinner *v.* Merchants' Bank, 4 Allen (Mass.) 290; Weckler *v.* First National Bank, 42 Md. 581.

[11] Stewart *v.* Huntingdon Bank, 11 Serg. & R. (Pa.) 267.

[11a] The statement of a director at home or on the street is not binding on the bank; but if he gives the promise or assurance in the name of the corporation which subsequently acts upon it or acquiesces in it the bank is bound. West Branch State Bank *v.* Haines, 135 Iowa 313, 112 N. W. 552 (1907).

[12] Pemigewassett Bank *v.* Rogers, 18 N. H. 255; Loomis *v.* Eagle Bank, Disney (Ohio) 285. See also Soper *v.* Buffalo & Rochester R. R. Co., 19 Barb. (N. Y.) 310.

owes no duty to the bank to answer interrogatories which relate only to a completed transaction. He is not employed for that purpose, or held out by the bank as intrusted to fulfil such a function. The interrogator simply requests a favor from the officer personally, which, if granted, can create no liability as against the bank.[13] But an exception will arise to this rule where the officer of the bank knows that his answer to the inquiry is to form the ground of future action on the part of the inquirer, so that accurate information is not merely desired to satisfy a curiosity as to an occurrence wholly in the past, but is sought and needed for governing important dealings in the present and future. So, too, if the declarations or admissions, though relating to something that is in mere point of time past, yet have for any reason a present interest and weight, or from any combination of circumstances assume a still subsisting importance, they will then be admissible as constituting a part of the *res gestæ*, without regard to the fact that the precise act itself to which they relate was, strictly speaking, concluded some time before. Thus where a person who had been called upon to pay a note, insisted that it had been paid; and in the discussion the president examined the books of the bank, became satisfied of the payment, and admitted it to have been made; it was afterward held that evidence of his admission was competent to bind the bank, because in fact it constituted a part of the *res gestæ*, and was made by him in the execution of his ordinary official duties.[14]

The cashier and a director falsely told C. that they considered G., the maker of a note, perfectly good. C. indorsed the note, and G. thereupon obtained its discount by the bank. The representations not being in the course of the agency of the officers, the bank could not be held, though they were wilfully false.[15]

L., who owned six shares of bank stock, asked C. for a loan on pledge of them. C., calling at the bank to ask if the stock was

[13] Pemigewassett Bank *v.* Rogers, 18 N. H. 255; Franklin Bank *v.* Steward, 37 Me. 519; Lime Rock Bank *v.* Hewett, 52 *id.*, 531; Franklin Bank *v.* Cooper, 39 *id.*, 542; Sterling *v.* Marietta & Susquehanna Trading Co., 11 Serg. & R. (Pa.) 179.

[14] Franklin Bank *v.* Steward, 37 Me. 519; Bank of Monroe *v.* Field, 2 Hill (N. Y.) 445.

[15] Mapes *v.* Second National Bank of Titusville, 80 Pa. St. 163. See Liggett *v.* Union National Bank, 233 Mo. 590, 136 S. W. 299, 1912C Ann. Cas. 70, n., where the question of whether or not the bank is liable to one who relies upon a letter of credit or commendation signed by its second vice president is undecided.

unencumbered, was told by the officer in charge of the bank's business that the stock was free, and he might safely take it; and it was held that the bank was estopped from declaring the stock forfeit for dues to it from L. before the shares were pledged to C.[16] And, where one is induced to sign a note as surety upon the assurance of an officer of the bank that certain stock of the maker is retained as security, the surety is only liable for the difference between the value of the stock and the amount of the note.[16a]

(*c*) A bank cannot escape the consequences of misrepresentation made by its officer by showing that the falsehood was told such officer by another, also an officer of the bank.[17]

(*d*) A bank is not bound by its teller's statement that the indorsement on a check is genuine.[18]

(*e*) If C. lends money to the cashier (A.) for his private use, and receives from him a certificate in the lender's name and signed by the president, but stating that shares are transferable only on the bank-books and on surrender of former certificate, and no certificate has been surrendered, and the bank has neither ratified the transaction nor received benefit therefrom, C., though defrauded by the cashier, has no remedy against the bank. The bargain was with A. personally. C. lent him money for his own use, not for the bank; and, his representations being in his own business, could not affect the bank. Moreover, the certificate on its face gave C. notice.[19]

If A bank receives a general inquiry from B bank as to the financial standing of a customer, and, in answering, fails to disclose the fact that the customer was indebted to A bank, and that it held liens on certain of his property, it will not be estopped in the absence of fraud to assert such liens as against a mortgage subsequently taken by B bank.[20]

§ 104. **When the Bank has Notice.**[0] — The grounds of decision in this matter are: —

[16] Moore *v.* Bank of Commerce, 52 Mo. 377 (1873).

[16a] Packard *v.* Harrington, 41 Kan. 469, 21 Pac. 621 (1889).

[17] Gould *v.* Cayuga National Bank, 56 How. Pr. (N. Y.) 505 (1877).

[18] Walker *v.* St. Louis National Bank, 5 Mo. App. 214 (1878).

[19] Moores *v.* Citizens' National Bank of Piqua, 111 U. S. 156, 28 L. ed. 385, 4 Sup. Ct. 345 (1884). See People's Bank *v.* Kurtz, 99 Pa. St. 344; Merchants' Bank *v.* Livingston, 74 N. Y. 223; Western, etc. R. R. *v.* Franklin Bank, 60 Md. 36.

[20] First National Bank *v.* Marshall Bank, 83 Fed. 725.

[0] § 104. Knowledge of the agent is chargeable upon the principal only when the principal, if acting for himself, would have received notice of

(*a*) First. *Presumed communication. Grounds of decision.* — It is the duty of an agent to give the bank the benefit of his knowledge concerning the business in which he is engaged by B., and in the absence of adverse interest rebutting the inference, he is presumed to do his duty.[0a] And the principal is chargeable with the information acquired by his agent, whether he obtained it in the course of the transaction of his principal's business or otherwise, provided the knowledge is so acquired by him as to be presumptively within his recollection when he is acting on behalf of his principal.[1]

(*b*) Second. *Identity. Knowledge of bank.* — B. cannot take any advantage of a third person, C., by employing A. to negotiate the business instead of doing it himself. Unless C. has notice to the contrary, he has a right to regard A. and B. as identical in respect to all notice that is received in the very transaction; for that B. would have received if he had conducted the business himself, and also in respect to information concerning the matter which C. knows A. to possess by previous or outside acquirement, and perhaps for that very reason does not further enforce the subject upon A.'s attention during the transaction. In such cases the notice enters into the dealing, is within the contemplation of both parties. And further, B. cannot escape from the effect of knowledge he himself possesses by employing A., and if there is reasonable time for B. to communicate his knowledge to A. before the event which raises the question, the transaction is affected by B.'s information.[2]

the matters known to the agent. Lanning *v.* Johnson, 75 N. J. L. 259, 69 Atl. 490 (1908).

[0a] American National Bank *v.* Miller, 229 U. S. 517, 57 L. ed. 1310, 33 Sup. Ct. 883 (1913).

[1] Bank *v.* Shook, 100 Tenn. 436, 45 S. W. 338 (1897); Le Duc *v.* Moore, 111 N. C. 516, 15 S. E. 888 (1892); National Bank *v.* Thomas, 30 R. I. 294, 74 Atl. 1092 (1910); Lowndes *v.* City National Bank, 82 Conn. 8, 72 Atl. 150, 22 L. R. A. (N. S.) 408 (1909); McCarty *v.* Kepreta, 24 N. D. 395, 139 N. W. 992, 1915A Ann. Cas. 834, n.

[2] Hummel *v.* First National Bank, 2 Col. App. 571, 32 Pac. 72; Mayhew *v.* Eames, 3 B. & Cress. 601.

The acts and knowledge of a manager of a bank who acts both for himself as an individual and as manager of the bank in the purchase of a note from himself by the bank are the act and knowledge of the bank. The manager is the *alter ego* of the bank. First National Bank *v.* Burns, 88 Ohio St. 434, 103 N. E. 93, 49 L. R. A. (N. S.) 764, n. (1913).

Credibility

§ 105. (1) The notice must be credible. It must be of a trustworthy and authentic nature. Rumor, or gossip, or statements proceeding from sources which might naturally be supposed inaccurate, are neither knowledge nor notice. Hearsay tales and idle talk can be properly disregarded, but information of so credible a nature that no reasonable man would dare to neglect it in his own private affairs cannot be neglected by a bank officer in the affairs of the bank.

Adverse Interest

§ 106. (2) If the third party, C., knows that A. has an adverse interest tending to cause him to withhold his knowledge from the bank, C. has no right to regard A. and B. as identical in the transaction, and cannot hold B.[0] So one who persuades a cashier not to impart his knowledge to the bank cannot hold the bank affected by such notice.[1] The knowledge of an officer in dealing adversely to the interests of the bank does not bind the bank.[2]

[0] § 106. Quoted in American National Bank *v.* Ritz, 70 W. Va. 409, 74 S. E. 679 (1912).

[1] First National Bank of Sturgis *v.* Reed, 36 Mich. 263.

[2] Bank *v.* Lovitt, 114 Mo. 519; 1 Morawetz on Corp., § 540 *c.*; Graham *v.* Orange Co. National Bank, 35 Atl. 1053 (1896); Brandon Bank *v.* Briggs' Assignees, 70 Vt. 594, 41 Atl. 580 (1898); Holm *v.* Atlas National Bank, 84 Fed. 119 (1898); Findley *v.* Cowles, 93 Iowa 389, 61 N. W. 998 (1895); Fort Dearborn National Bank *v.* Seymour, 71 Minn. 81, 73 N. W. 724 (1898); Benton *v.* German-American National Bank, 122 Mo. 332, 26 S. W. 975; American National Bank *v.* Miller, 229 U. S. 517, 57 L. ed. 1310, 33 Sup. Ct. 883 (1913); Libby *v.* Hamilton Bank, 178 Fed. 53, 29 L. R. A. (N. S.) 558, n. (1909); Real Estate Trust Co. *v.* Washington etc. R. Co., 191 Fed. 566 (1910); Pueblo Savings Bank *v.* Richardson, 39 Colo. 319, 89 Pac. 799 (1907); Bank of Hartford *v.* McDonald, 107 Ark. 232, 154 S. W. 510 (1913); American National Bank *v.* Ritz, 70 W. Va. 409, 74 S. E. 679 (1912); Dominion Trust Co. *v.* Hildner, 243 Pa. St. 253, 90 Atl. 69 (1914); City Bank *v.* Bryan, 72 W. Va. 29, 78 S. E. 400 (1913); Bank of Overton *v.* Thompson, 118 Fed. 798 (1902); Bank of Le Roy *v.* Purdy, 100 App. Div. 64 (1905), 91 N. Y. S. 310; German-American State Bank *v.* Soap Lake etc. Co., 77 Wash. 332, 137 Pac. 461 (1913); Stanford *v.* Coram, 26 Mont. 285, 67 Pac. 1005 (1901); Corporation Commission *v.* Bank of Jonesboro, 164 N. C. 357, 79 S. E. 308 (1913). The bank is not affected with the notice of three directors who do an unauthorized act and who expressly agree to conceal it from the bank. Traders etc. Bank *v.* Black, 108 Va. 59, 60 S. E. 743 (1908).

But if the agent is in fact acting for his principal in the transaction, even though he may have an opposing personal interest, the law will presume, in favor of third persons, that he has communicated his knowledge to the bank. McKenney *v.* Ellsworth, 165 Cal. 326, 132 Pac. 75 (1913); Williams *v.* Hasshagen, 166 Cal. 386, 137 Pac. 9 (1913).

§ 107. (3) Subject to (1) and (2) we have the following rules.

Special Appointment or Duty

(*x*) Notice to one whose business it is to receive such notice binds the bank, whether such agent has any other duty to perform in regard to the matter to which the notice relates or not. Any one the bank, or directors, or custom, may appoint for the very purpose of receiving notices of course has power in the matter, resting on the same principles as the authority to do any other act. For example, it is part of the president's inherent power to receive notice of suits against the bank.

Did the Agent Act?

§ 108. (*y*) If (*x*) does not apply, the next question is, *Did A. act for the bank in the business to which the notice relates?* [1]

If not, the bank is not affected by his knowledge.

If he did so act, then the question is, *When* did he receive the information, and in what capacity?

If it came to him officially, while acting in the very business which it concerns, it binds the bank, if it came in sufficient season to be acted upon.[2]

§ 109. If notice comes to A., as it might to any other individual, not officially nor while acting for the bank in the business to which it relates, as if it is *previous* [1] to his employment as agent, then the bank is bound, provided, —

1st. That the information is not privileged in law.

[1] § 108. See Hoover *v.* Wise, 91 U. S. 308, 23 L. ed. 392; Commercial Bank *v.* Cunningham, 24 Pick. (Mass.) 270.

[2] See Fairfield Savings Bank *v.* Chase, 72 Me. 226; Bank of United States *v.* Davis, 2 Hill (N.Y.) 451; Perry Navel Stores *v.* Caswell, 63 Fla. 552, 57 So. 660 (1912).

[1] § 109. See the Distillery Spirits, 11 Wall. 356, 20 L. ed. 167; National Bank *v.* Cushman, 121 Mass. 490; Fairfield Savings Bank *v.* Chase, 72 Me. 226; Anketel *v.* Converse, 17 Ohio St. 11; Hart *v.* F. & M. Bank, 33 Vt. 252; Blumenthal *v.* Brainard, 38 Vt. 410; Hayward *v.* National Ins. Co., 52 Mo. 181; Dresser *v.* Norwood, 17 C. B. N. S. 466; Fuller *v.* Benett, 2 Hare 402; First National Bank *v.* Burns, 88 Ohio St. 434, 103 N. E. 93, 49 L. R. A. (N. S.) 764, n. (1913). But Pennsylvania holds that notice twenty-four hours before the agency is no more notice to the principal than if received twenty-four hours after it ceased. Houseman *v.* Girard Mut. Bldg. and Loan Association, 81 Pa. St. 256. Notice to an agent of the bank is notice to the bank in transactions conducted by such agent acting for the bank, within the scope of his authority, whether his knowledge was acquired in the course of the particular dealing, or on some prior occasion. Cragie *v.* Hadley, 99 N. Y. 131.

2d. That it is so recent, and is so circumstanced in other respects, as to render it reasonably probable that it was still present in the mind of A. when acting for B. in the matter to which it relates. It would be hardly fair to hold the bank responsible for A.'s failure to remember a remote piece of information.

3d. That A. has no interest adverse to communication of his knowledge to the bank; or if he has such interest, that C. is aware of A.'s possession of the knowledge, but not aware of the adverse interest. If C. knows of the adverse interest, the case comes under § 106. If C. does not know of the adverse interest, nor that A. has the knowledge, the knowledge being previous, the bank cannot be held on the ground of identity with A. at the time of receiving notice, nor upon the presumption that A. communicates for the adverse interest rebuts the presumption.

But although this seems to be the rule laid down by the cases cited, it seems questionable whether in any case B. should be allowed to take advantage of A.'s bad faith. Of course the responsibility should ultimately fall upon A.; but as between B. and C., C. is entirely innocent, while B. has at least erred in judgment by selecting an agent whose conduct is blameworthy. If the loss by reason of A.'s bad faith must rest upon either B. or C., it seems clear that the blot is on B.'s side of the line; his conduct in selecting a defective instrument has caused loss to C. which would not have resulted if the instrument employed by him had come up to the standard of good faith which it is one of the great objects of the law to secure in commercial dealings.

If the third party, C., does not know of the adverse interest of the agent, A., but does know that A. has the knowledge, (which perhaps C. had himself imparted to A. before he became agent, or while not acting as agent), C. certainly has a right to consider that notice as entering into the dealing between them, just as truly as if it had come to A. in the course of that very transaction.

§ 110. (4) If A. *assumes* to act as agent for the bank, B., and B. afterward adopts or takes the benefit of the act, B. takes it subject to notice of all such matters as appear to have been at the time within the knowledge and recollection of A.[1]

When Notice to Agent does not Affect Bank

§ 111. (5) Notice to an agent in regard to a matter in which he *does not act for the bank* is not notice to the bank; nor if while act-

[1] § 110. Hovey *v.* Blanchard, 13 N. H. 145.

ing for the bank he has information of matters which do not affect his own duties, nor relate to the bank's business in a way that comes within the scope of his employment.[0]

For example, if one is engaged in mere ministerial duties, as a clerk copying a deed, his knowledge of a former deed or incumbrance on the land is not notice to the bank.[1] Notice to a bank messenger, whose only duty is to collect paper and not to report responses of persons who refuse to pay, is not notice to the bank.[1a] But a bank is charged with notice of letters mailed to it, but wrongfully suppressed by a bookkeeper whose duty it is to open and distribute the mail.[1b] If it does not concern a matter which falls within the scope of his real or presumable agency and official employment, apparently he is at liberty to disregard it, and the bank cannot be injuriously affected by his so doing. For the bank, having neither made him its agent nor held him out as such in these premises, is bound by nothing which he does, says, or hears therein. If the cashier knows or learns something concerning a matter exclusively within the functions of the president, his knowledge is not the knowledge of the bank. In the language of the court in the case of The Fulton Bank *v.* New York and Sharon Canal Co., " if the notice be to one who has no duty to perform relative to the subject matter of the notice, it will not be enough." [2] The words were used in discussing notice to a director, but they state a doctrine of general application.

In the case of knowledge acquired by or communicated to any other officer than a director, little difficulty can arise. The president, it should be remembered, is a director. But his duty of supervision is more extensive than that of any other member of the board. Wherefore notice to him on any subject would probably be held to be notice to the bank.[3] Generally it may be said that if the notice relates to any matter which falls within the scope of

[0] § 111. Sturdee *v.* Cuba Easton R. Co., 196 Fed. 211 (1912).

[1] See remarks in Fairfield Savings Bank *v.* Chase, 72 Me. 226.

Casual notice acquired by an employee is not notice to the bank, in the absence of evidence of his duties. Marsh *v.* Wheeler, 77 Conn. 449, 59 Atl. 410 (1904).

[1a] Camp *v.* Southern Bank, 97 Ga. 582, 25 S. E. 362 (1895). When a bookkeeper knew of the dissolution of a firm because he was its bookkeeper his knowledge did not bind the bank of which he was assistant cashier and bookkeeper. Morris *v.* First National Bank, 162 Ala. 301, 50 So. 137 (1909).

[1b] First National Bank *v.* Fourth National Bank, 56 Fed. 967.

[2] 4 Paige (N. Y.) 127. [3] Porter *v.* Bank of Rutland, 19 Vt. 410.

the agency and official employment of the officer to whom the notice is given, then it is notice to the bank.

(*a*) In Fairfield Savings Bank *v.* Chase,[4] Brown, an attorney and one of the trustees, was engaged to draw a mortgage, *i.e.* to convey title to the bank, and he knew there was a prior deed of the property which failed to be recorded till after the mortgage. It was held, that, if Brown was acting *for the bank* in the matter of drawing the mortgage, his knowledge was notice to the bank, but as the evidence on this point was doubtful, it should have gone to the jury, and as it did not, the verdict was set aside.

§ 112. (6) **Notice to a single Director.** — It has been held that each member of the board of directors is the agent of the bank to receive notice, and if he *acts* in the matter, although only one of a large majority, the others all acting honestly and without notice, actual or constructive, yet the knowledge of the one director binds the bank as much as if he were a sole agent, doing the business alone.[1]

It is a question whether it is just, in case of a composite agency like the board of directors, to hold the bank bound by the *knowledge of one*, any more than by the other individual conduct of one. Since the power and agency is in *the board*, and is not intrusted to individuals, it would seem proper that, to affect the bank, the knowledge should be that of *the board*, or of so many that its action would not stand after taking away the votes of those having notice. The directorial act should *involve* the notice, the knowledge should enter into and *taint the cause* of the bank's conduct, in order to vitiate it. See § 114.

(*a*) In Louisiana State Bank *v.* Senecal,[2] the court thought it reasonable that there should be formal notice to the board, or at least that the majority of the directors should be affected.[2a] This

[4] 72 Me. 226 (1881).

[1] § 112. North River Bank *v.* Aymar, 3 Hill (N. Y.) 262; Bank of United States *v.* Davis, 2 *id.*, 451.

[2] 13 La. 527.

[2a] The mere knowledge of one or more directors, less than a majority of the board, and of the vice president of the bank is not imputable to the bank so as to affect the liability of a surety on an indemnity bond. Fidelity etc. Co. *v.* Courtney, 186 U. S. 342, 46 L. ed. 1193, 22 Sup. Ct. 833 (1902).

When a bank employs the president and general manager of a bankrupt company as its agent in collecting accounts which the company has assigned to the bank as security for a loan, the bank is chargeable with the knowledge of such agent that the company was insolvent. *In re* Cotton Manufactures Sales Co., 209 Fed. 629 (1913).

perhaps is going as far the other way in statement, though the thought of the court was probably really directed to the point of causation which we are noticing.

An individual director, unless specially authorized, is not the agent of the bank to do any business; he is simply one member of a composite agency, that must act as a unit to bind the bank.

For this reason the argument used above in § 108 to enforce the liability of the bank where A. is guilty of bad faith, though in regard to previously acquired information, does not apply here; the instrument used by the bank is the board as a unit, and unless the board as a unit is affected with bad faith the transaction is pure. If an officer acts with due care and in good faith, it cannot make his conduct anything but morally and legally good and proper because some one who is acting dishonestly may give him advice.

Suppose a director (D.) has knowledge and stays away from the meeting, and the board votes by five majority to do a certain thing to which D.'s notice relates, the cases are clear, the bank is bound. Now suppose he takes his seat, and there is a majority of six, an honest majority of five, how is the bank's action vitiated? Or suppose he goes further, and argues for the resolution; the others have a right to hear argument from any source, and weigh it candidly; if they are really honest, the vote is still untainted. If there is one white hair in a beard, it is hardly correct to say the beard is white, and fraud in the vote of a single town will not vitiate the election of a President of the United States.

Conclusion

(*b*) Still, the law, in order to avoid troublesome inquiry and prevent the possibility of fraud, is in the habit of drawing broad lines beyond all the doubtful territory, and so it may continue to be law that knowledge of a single director acting in the business for the bank while possessing such notice is sufficient to bind the bank; although strict justice would require no more than that, when it is shown that one director had notice, the burden of proof should be on the bank to show that the action of the board was not determined by that director.

Note on the Competency of Bank Officials and Shareholders as Witnesses on Bank's Behalf

§ 113. It may now be laid down, in general terms, that the officer or agent of the bank is a competent witness in its behalf, even concerning

a transaction which he himself conducted, or in which he was interested or engaged. In such cases it must frequently happen that the officer or agent will be personally and closely interested in the determination of the litigation. For if the bank should fail of success by reason of any inaccuracy, irregularity, or wrongfulness in his proceedings, it must be anticipated as a natural result that he will himself be sued by the bank, either upon his official bond or his common law liability, and held to answer for the consequences of his default, besides suffering all the collateral mischief of a loss of his position and reputation. The latter fact, of course, could not operate to render him incompetent, but must be confined to affecting his credibility. The former fact, however, goes directly to the question of his competency. It is not to be supposed that the extension of the exception to the general rule to cover these cases has been allowed to take place without opposition. But the several decisions have been uniformly in favor of the admission of the testimony, so that the matter must at last be regarded as definitively settled according to the above doctrine.

(*a*) The simplest class of cases, those in which the objectors to the competency certainly had but very little ground to stand upon, were those wherein the officer or agent had been formally and sufficiently released by the bank from all manner of claim which it might have against him, even if he should appear to have been in default. No difficulty seems to have been experienced in disposing of these in favor of the admissibility.[1] The next step in advance was taken in the cases in which some possible question might arise as to any liability of the officer or agent to the bank. But admitting a possibility that he might be held by the bank, yet this was by no means equivalent to the established fact that he certainly could be so held. It was an assumption, which might so obviously prove erroneous, that the court could not be expected to make it. The contingent impropriety of receiving the testimony could not be allowed to have equal effect with a positive impropriety. So again in these cases the narrow question of intrinsic competency was evaded, and the evidence was admitted as it were through a side door.[2] But it was not of course always possible, however much the courts might have wished it to be so, thus satisfactorily to flank the main position of the objectors. Sooner or later the question of the intrinsic competency of such persons as witnesses must arise, and must be decided fairly upon its own merits; and it having finally arisen in various States, the courts of each, thus far without an exception, have decided to admit the testimony offered. The Supreme Court of the United States and the text-books on evidence have adopted the same rule.[3] The obvious necessity of the case has conquered all less

[1] § 113. Farmers & Mechanics' Bank *v.* Champlain Transportation Co., 18 Vt. 131; 23 *id.*, 186; Johnson *v.* Farmers' Bank, 1 Harr. (Del.) 117.

[2] Franklin Bank *v.* Freeman, 16 Pick. (Mass.) 535; Union Bank *v.* Knapp, 3 *id.*, 96.

[3] United States Bank *v.* Stearns, 15 Wend. (N. Y.) 314; Farmers & Mechanics' Bank *v.* Champlain Transportation Co., 18 Vt. 131; Huntress *v.* Patten, 20 Me. 28; Jackson *v.* Bank of the United States, 10 Pa. St. 61; 2 Starkie on Evidence, 753, 767, 768, n. 2; 1 Greenleaf on Evidence, 416, 417; Wigmore on Evidence § 575, *et seq.;* Cookendorfer *v.* Preston, 4 How. 317, 11 L. ed. 992; Franklin Bank *v.* Freeman, 16 Pick. (Mass.) 535. See also Wiggin *v.* Freewill Baptist Church, 8 Met. (Mass.) 301.

objections. It must be that an officer should be allowed under oath to state what he had done; since otherwise the bank was so utterly tongue-tied that it must fall an inevitable sacrifice to the most unworthy plaintiff, and furnish an obvious temptation to dishonest suits.

Shareholders as Witnesses

(*b*) A shareholder in the bank, by assigning away his stock, may render himself a competent witness in its behalf. Neither is it too late for him to make the assignment after the suit has been begun.[4] If a statute of the State in which the bank is incorporated declares stockholders to be liable to the holders of notes of the bank in case of the insolvency of the corporation, the contingent liability under this law of one who has at any previous time been a stockholder will not impair his competency as a witness. His interest in the affairs and prosperity of the bank is too remote to be permitted to have this effect, at least unless there is some evidence of inability on the part of the bank to meet its liabilities.[5]

Declarations of Officers

(*c*) W. seeks credit at a bank and makes certain representations to the cashier concerning his standing. If the cashier reports the conversation to the "discount committee", and the bank subsequently attempts to set aside the transaction on the ground of fraudulent representations, the members of the committee may testify as to what the cashier stated to be W.'s conversation.[6]

Declarations by the manager of a bank after the bank's insolvency as to the state of old accounts are admissible to show the true state of the accounts, the bank-book having been surrendered.[7]

[4] Meighen *v.* Bank, 25 Pa. St. 288.

[5] *Ibid.;* citing also Willings *v.* Consequa, 1 Pet. 301; Curcier *v.* Pennock, 14 Serg. & R. (Pa.) 51; Irvine *v.* Lumbermen's Bank, 2 Watts & S. (Pa.) 190.

[6] National Bank *v.* Illinois and Wisconsin Lumber Co., 101 Wis. 247, 77 N. W. 185 (1898).

[7] Dingley *v.* McDonald, 124 Cal. 90, 56 Pac. 790 (1899).

CHAPTER IX

DIRECTORS

§ 115. Division of Management. The bank may divide the management among several boards or committees.

Authority.

§ 116. Management and superintendence. They are the brains, judgment, discretion, of the bank; they can delegate the execution of their decisions and limited discretion in small matters, but not discretion in weighty matters. §§ 143, 151.

§ 117. Allowing discounts is an exclusive power of the board, though the execution may be delegated, as by giving the cashier authority to discount for a certain person to a certain amount. Allowing overdrafts is also an exclusive function. §§ 357, 358.

§ 118. Execution of daily routine is not a part of the management.

§ 119. They may release a debt due the bank if they think it best for the bank's interest.

§ 120. They may pledge or assign property of the bank to pay or secure creditors, just as an individual may.

§ 121. Issuing bank bills when the bank has the right is an exclusive function of the board.

§ 122. Directors may arrange with other banks for collection, redemption of bills, transfer of stock, etc.

§ 123. They may remove the president, or any other officer.

§ 124. The power of directors rests in them as a board, not as individuals. In the absence of express provision, a majority is a quorum, and a majority of a quorum at a legal meeting is necessary to bind the bank. No individual director has authority to bind the bank by his representations or statements, but he may make himself liable for misrepresentation, or slander, or libel.

Duty. § 163.

§ 125. Directors must show a *reasonable capacity* for their position, must exercise discretion and industry *in good faith*, and must obey the directions of the charter and organic law. They are trustees, owing their first duty to the public, so far as concerns the circulating notes of the bank (if it has any), next to the depositors, and then to the stockholders; and, in common with all persons acting in a fiduciary capacity, it is their duty not to acquire any interest adverse to that of the bank, nor to make any profit from their employment.

§ 126. It is their duty to repudiate the wrongful acts of subordinate officers, and to discharge a guilty one.

§ 124. They should see that their fellow directors are properly notified of meetings.

No Power.

§ 127. They have no power to increase the capital or to work any organic change. § 144.

They cannot release a shareholder fom his liability. § 671.

§ 125. They cannot make a profit for themselves from their trust, except such as is common to all stockholders, nor make a contract in which they have an adverse interest.

§ 127. They cannot give away the bank's property. Their discretion is limited to conducting the affairs of the bank so as to increase its profits, and to enhance the value of its property intrusted to them in the pursuance of legitimate banking business. They cannot make the bank an accommodation indorser nor a gratuitous surety in any way.

§ 116. They cannot delegate discretion in important matters.

Nor acquire adverse interest to bank; but if a director votes in a matter improperly, the bank will still be bound to innocent third parties. § 127 *c*.

Liability. §§ 79, 129, 147, 717 *c*; II. §§ 53, 253.

To the bank or shareholders.

§ 128. For any loss by reason of their incompetence, bad faith, or negligence of duty. But an error of judgment, such as any one of reasonable capacity might make, or an innocent mistake of fact, is an excuse. Ignorance, however, of any fact which reasonable diligence in the discharge of duty would have brought to knowledge is not innocent. Ill health is held no excuse for such ignorance.

Only the directors who *cause* the damage are liable, though in Georgia it is held otherwise. § 130, *d*, *e*.

In some States the law provides how dissenting directors may avoid liability.

For incurring debt beyond the legal limit.

For loan beyond limit.

For wrongful issue of bills.

§ 129. A bank's claim against a director for dishonesty, negligence, or incompetency is assets in the hands of a receiver.

To third parties. II. §§ 53, 253.

§ 130. In absence of statute provision, directors are not liable to third persons dealing with the bank for damage caused by their mismanagement, unless their conduct is grossly negligent, or malicious, or fraudulent. Their contract is with the bank. If a director misrepresents or makes a contract binding on himself, or is guilty of tort in any way, he is of course liable, as is any other individual or agent. Every one assisting in a wrong, as in making deceiving statements in corporate reports, is personally liable, unless a mere instrument.

One allowing himself to be held out as a Director. § 148.

§ 131. Is liable to one misled by his conduct, and perhaps to all who could hold him if he were a real director, even though not knowing of the holding out.

When a Bank is made liable by the Conduct of Directors. § 79.
An individual director, as such, has no power to make the bank liable in any way.

Contract.
Director Voting in Case he is adversely Interested. §§ 125 *b*, 127 *c*.
(1) Whenever the board (as such, § 124) undertakes to contract for
§ 127. the bank in a way that, so far as may be ascertained by any facts actually or constructively known to C. (the party between whom and the bank the controversy on the contract arises), is within the scope of their powers and duty as the managing body in the bank's business, it is the contract of the bank as to C. If really *intra vires*, the bank is of course bound; if *ultra vires*, it may or may not be bound. See *Ultra vires*.
(2) If the board undertakes to contract, and C., whose right is in question, did know or ought to have known, as matter of law, upon the facts of which he had notice, that they were going beyond the scope of their agency, their act is not that of the bank as to C.
(3) Any action of the board authorizing or ratifying the contract of any other officer is governed by the same consideration. Their action is that of the bank if really valid, or if C. has a right to deem it so.
(4) Declarations of directors. See § 103 *a*.

Tort. §§ 147, 172.
§ 132. Under the principles of § 102, the bank is liable for the tort of the board, or of a subordinate officer authorized or ratified by the board, *e.g.* libels and false statements in corporate reports.
§ 126. If the directors knowingly allow the bank to take the benefit of the wrong of an officer, or retain him in the bank's service, or otherwise adopt his act, the bank will be liable.

Forfeiture. § 722.
§ 126. Any act of the board which upon the facts known to them, or which ought to be known to them by reasonable diligence, is in violation of the law governing the bank, may cause forfeiture; and if they authorize such breach of law by a subordinate officer, or if they *knowingly* allow the bank to get the benefit of such an act, or retain the wrongdoer in the bank's service, or otherwise adopt or ratify his conduct, it will make the bank liable to forfeiture. II. § 35.

Crime.
Though outside our subject, we may note that the board may make the corporation liable to indictment, as by authorizing a public nuisance or publishing a libel.

Notice. § 9, n. 9; § 166.
Knowledge (such as a man of ordinary prudence would regard in his own affairs).
§ 133. Of the Board, by open mention or discussion at a meeting, or what they should know by due diligence in discharge of their trust, binds the bank as to third parties (except sureties on an officer's bond, *q. v.*).
Of a single Director.

Constructive knowledge of a single director does not bind the bank.

As to actual knowledge, the rules are as follows.

§§ 134–136. THE BANK IS NOT BOUND by notice to one director.

(*a*) (1) If the third party (C.) knows D. has adverse interests.

(2) If D. is not specially appointed to receive such notice, and did not act for the bank in the matter to which it relates, or, if he did act, but the knowledge was gained previous to or outside of the agency, and he has an adverse interest, or the information is not fairly to be presumed still present in his mind at the time of the agency in the matter to which it relates.

(*b*) THE BANK IS BOUND when (*a*) (1) does not apply, in four cases.

(1) If D. is specially authorized to receive the notice.

(2) If he is acting for the bank in the matter to which the notice relates at the time of receiving it.

(3) If, after receiving the notice in any manner, he acts for the bank in the matter with the information still presumably in his mind and without adverse interest.

(4) If he acts with such information presumably present, even though he has an adverse interest, if this fact is not known to C. and the fact of his having the knowledge *is* known to C.

§ 137. (*c*) A director is as an individual chargeable with his own knowledge, actual or constructive, of course, but it is not a conclusive presumption that he knows all the details of the bank business.

RIGHTS,

Unless prohibited,

§ 125. May take a loan from the bank, but must not act at the granting of it.

§ 124. Each has by his office a right to scrutinize all the affairs of the bank, to have notice of meetings, and to have access to the bank books, etc.

§ 138. QUALIFICATIONS. II. §§ 9, 10.

Frequently required to own a prescribed number of shares in the bank to identify its interests with their own.

CONTINUANCE IN OFFICE.

§ 139. Bankruptcy does not vacate the office, but circumstances may show abandonment.

§ 140. PAY OF DIRECTORS. § 150.

§ 141. RECORDS.

DE FACTO DIRECTORS. See § 98 *b*.

§ 115. **Division of Management.** — It has been held, that a banking corporation may divide the total of its business into various distinct departments, choosing a separate board of directors to have control of each respectively. Or it may have but one board, and divide it into committees, conferring upon each committee supreme power in its appropriate department. Then

the resolutions of each committee within the scope of the business allotted to it will be equivalent to and of the same effect as similar resolutions of the entire board.[1] But in the latter case the powers intended to be exercised by each committee should be distinctly conferred upon it, as in any other case of delegation of authority. The mere nomination of two or three among the directors to constitute a "finance committee", may impose duties or especial watchfulness and supervision upon them, but without some further delegation of real power to them it does not give them the supreme control and management of all the financial transactions and business of the bank. Their duties rather than their powers are enlarged. The intent to increase the authority which they already have, if individual directors can be properly said to have any authority at all, must be expressed in some more clear and precise manner than by the simple act of giving the name of "finance committee" to A. B. and C. D. out of the whole number of the board. So it was held in New York that the president, cashier, and "finance committee" of the board could not mortgage corporate real estate without the concurrence of the board of directors; although practically the president and cashier had been wont to exercise very large authority and discretion in the management of the bank's affairs. The finance committee as such enjoyed no extraordinary power.[2]

§ 116. **Board of Directors. — General Functions.**[0] — The general control and government of all the affairs and transactions of the bank rest with the board of directors.[a] For such purposes the board constitutes the corporation, may act as the corporation,

[1] § 115. Palmer *v.* Yates, 3 Sandf. Super. (N. Y.) 137.

[2] Leggett *v.* New Jersey Banking Co, Saxt. (N. J.) 541.

[0] § 116. See Cassidy *v.* Uhlmann, 170 N. Y. 505, 63 N. E. 554 (1902); Kavanaugh *v.* Gould, 147 App. Div. 281 (1911), 131 N. Y. S. 1059; Lyons *v.* Corder, 253 Mo. 539, 162 S. W. 606 (1913).

[a] Fed. Res. Act. Sec. 4, Part II. § 105; Ellis *v.* Mercantile Co., 103 Miss. 560, 60 So. 649, 1915B Ann. Cas. 526, n., 43 L. R. A. (N. S.) 982; Daugherty *v.* Poundstone, 120 Mo. App. 300, 96 S. W. 728 (1906).

Directors who have personal individual business with the bank cannot represent the bank in their personal transactions with it, nor participate in such representations. Tecumseh National Bank *v.* Chamberlain Banking House, 63 Neb. 163, 88 N. W. 186, 57 L. R. A. 811 (1901).

Surplus Funds. The power of directors over the surplus funds is absolute, in the absence of restraint by by-laws or charter, as long as they act with honest motives and judgment; and a statute which requires them to reserve at least $100,000 does not require them to limit the reserve to that amount and distribute the surplus as dividends. Mulcahy *v.* Hibernia Savings etc. Society, 144 Cal. 219, 77 Pac. 910 (1903).

and unless specially restricted may with few exceptions (see § 127) exercise all the powers which the corporation is authorized at common law, or under the charter or organic law, to exercise. Organic banking laws and charters customarily confer upon the board in broad phraseology the general power to conduct and manage the corporate business. But this language is practically only a recognition of the functions which the board would be entitled and called upon to exercise by the rules of common law, and does not operate to enlarge those functions, or to designate them with any greater particularity. Neither can the duty thus conferred be construed as a requisition upon the directors to undertake the performance, in person, of all the acts called for by the daily routine of the business of the bank. It extends to such matters only as are usually and conveniently allotted to the charge of directors in the banking business. Some such acts they must perform; others they may perform. But the obligation is measured by a uniform usage prevailing among banks universally. Their personal execution may be restricted to the matters thus designated, unless others be specifically named or added in the law. Besides a variety of specific acts which they must initiate or wholly do, this uniform usage imposes upon them the "general superintendence and active management" of the corporate concerns. They are bound to know all that is done, beyond the merest matter of daily routine; and they are bound to know the system and rules arranged for its doing. So, though it has been said that powers of a public character given by the legislature to any body of individuals can never be sub-delegated by the recipients,[b] yet this doctrine has never been allowed to prohibit bank directors from appointing agents and endowing them with sufficient powers for executing the resolutions of the board, and carrying on, without specific authority in each individual case, the ordinary transactions of daily business.[1]

[b] The board of directors cannot delegate its legislative and judicial functions unless expressly so authorized either by the general law or by the charter or by-laws of the bank. Swindell *v.* Bainbridge State Bank, 3 Ga. App. 364, 60 S. E. 13 (1908).

[1] Kavanaugh *v.* Gould, 147 App. Div. 281 (1911), 131 N. Y. S. 1059. See Ellis *v.* First National Bank, 22 R. I. 565, 48 Atl. 936 (1901). While the directors of a national bank cannot divest themselves of the duty of general supervision and control by committing this duty to the cashier,[a]

[a] See Bailey *v.* O'Neal, 92 Ark. 327, 122 S. W. 503, 135 Am. St. Rep. 185 (1909); Fletcher *v.* Eagle, 74 Ark. 585, 86 S. W. 810, 109 Am. St. Rep. 100 (1905).

The board may authorize the president or cashier, or both, to borrow money, indorse the notes of the bank, or obtain a discount for the benefit of the bank.[2] Accordingly they may delegate to a committee of their own number, power to mortgage real estate of the corporation, including as a necessary implication power to execute and deliver the ordinary and proper instruments.[3] Although dealings in real estate are of the most dignified and formal character of any dealings in the eye of the law, yet general supervision even of these satisfies the duty of the board. All beyond this may be delegated. They may empower the president alone, or the president and cashier conjointly, to borrow money on behalf of the bank, to indorse its promissory notes, to obtain discounts for its use; these powers also including the power to make delivery of the paper thus negotiated. It seems also that these powers may be conferred not only by a special vote passed with a view to a single occasion, but also by a general resolution looking to their frequent exercise on various occasions.[4] But votes of this broad nature, unless very cautiously indulged in, are likely often to be improper and in some degree unsafe. For if they appear to go too far in throwing within the discretion of others the decision of weighty matters covering a wide ground of responsibility, they would amount to an effort in a measure to delegate the "management" of the business of the bank. To this extent the board of directors cannot go. Within reasonable and moderate limits, so narrow that their general supervision must practically cover all which their delegates can do within these limits, they may confer powers by a general resolution, which may be valid for an indefinite period and for any number

they may properly intrust to him all the discretionary powers which usually appertain to the immediate management of the bank's business. Warner *v.* Penoyer, 91 Fed. 587 (1898); Burrill *v.* Nahant Bank, 2 Met. (Mass.) 163; Ridgway *v.* Farmers' Bank, 12 Serg. & R. (Pa.) 256.

Where directors have acted with good faith and ordinary diligence they are not liable for losses resulting through secret peculations and secret false entries of the cashier. Mason *v.* Moore, 73 Ohio St. 275, 76 N. E. 932, 4 L. R. A. (N. S.) 597 (1906); nor for the negligence of officers in paying out money on unauthorized checks. Daugherty *v.* Poundstone, 120 Mo. App. 300, 96 S. W. 728 (1906).

[2] Fleckner *v.* Bank of the United States, 8 Wheat. 355, 5 L. ed. 635; Stone *v.* Rottman, 183 Mo. 552, 82 S. W. 76 (1904).

[3] Burrill *v.* Nahant Bank, 2 Met. (Mass.) 163.

[4] Ridgway *v.* Farmers' Bank, 12 Serg. & R. (Pa.) 256; Merrick *v.* Bank of the Metropolis, 8 Gill (Md.) 59; Fleckner *v.* Bank of the United States, 8 Wheat. 338, 5 L. ed. 631.

of separate transactions. But authority so large as to transfer in an important degree the control of the corporate affairs they cannot confer.

Allowing Discounts Exclusive. Execution may be Delegated

§ 117. Thus the making of discounts is an inalienable function of the directors. They cannot part with it, or invest any officer or officers with it. It rests in them alone and exclusively. It is a power of that degree of vital importance that it cannot be taken out of the policy of the general principle that powers of a public nature, given by the legislature, cannot be sub-delegated.[1] The legislature imposes upon the board the duty of taking charge of all those matters of business upon the wise and skilful conduct of which the prosperity of the institution and the safety of persons dealing with it depend. This duty they cannot shift in whole or in part upon others, and it covers no department of banking business more unquestionably than the making of loans and discounts. The case cited below, Bank Commissioners *v.* Bank of Buffalo, if carelessly read, might seem to give the directors power to confer upon the financial officer of the bank a general authority to discount. But a more careful examination serves to show that quite the contrary was intended, and that the case really illustrates the doctrine of the last preceding paragraph. The board may give the financial officer by a single resolution power to make a considerable number of discounts or loans, provided they be requested. But this single resolution must name the person or persons to whom the loans may be made, the aggregate sum which they must never exceed, the time, and such other particulars as the directors may deem of moment. Thus in fact though many separate acts may be authorized by this one vote, yet nothing is really done beyond the supervision of the directors, or without the active exercise of their discretion. They may order the cashier to let A. have such loans as he shall wish, in such sums and at such times as he shall ask, within a certain period, up to the amount of a designated sum, to run for specified times, at rates of interest named, and upon designated conditions concerning indorsers or collateral security. This does not leave each individual discount made to A. to be passed upon by the directors;

[1] § 117. Lyon *v.* Jerome, 26 Wend. (N. Y.) 485; Mutual Trust Co. *v.* Stern, 235 Pa. St. 202, 83 Atl. 614 (1912).

yet in fact no discount is made to him by any official authority other than that of the board, or at the substantial discretion of any person save the directors. Such is unquestionably the real thread of legal principle which runs through the cases cited in this and the next preceding paragraph. It alone can make them intelligible and consistent with established rules.[2]

Executive Functions not Management

§ 118. The ordinary executory functions of the various officers of the bank are not necessarily affected by the statutory delegation of the management of all corporate affairs to the board. Management is not identical with execution, and does not intend execution. Checks are drawn, notes and bills indorsed, deposits received, drafts paid, and the like transactions conducted, as matter of course, by the appropriate customary officers without any authorizing vote of the directorial board. These matters do not constitute the "management" of the bank, nor interfere with the "control" of its affairs. They are properly the medium through which that management and control are introduced into the practical transactions.[1]

May Sometimes Release Debt or Make a Compromise

§ 119. As a rule, they cannot voluntarily release a debt owing to the company;[1] but where the emergencies of business require it, they may make a nominal or merely apparent sacrifice of bank property, if it seems reasonably likely to redound to the substantial benefit of the institution. In the *bona fide* pursuit of this end, their power is not limited by technical restrictions which, under other circumstances, would forbid their cancelling debts owing to the bank. The case of Baird *v.* Bank of Washington[2] shows that they may commute a debt if it seems to them practically more advantageous to do so than it would probably be to push it at law, or to retain the naked legal claim for the full amount. In like manner, if any officer of the bank is in arrear or

[2] Bank of the United States *v.* Dunn, 6 Pet. 51, 8 L. ed. 316; Bank Commissioners *v.* Bank of Buffalo, 6 Paige (N. Y.) 497; Percy *v.* Millaudon, 3 La. 568.

[1] § 118. Daugherty *v.* Poundstone, 120 Mo. App. 300, 96 S. W. 728 (1906).

[1] § 119. Stanhope's Case, 3 De G. & Sm. 198.

[2] 11 Serg. & R. (Pa.) 411.

default, it is perfectly in their power to compound and settle with him in any manner and upon any terms which seem to them likely to secure the most complete reimbursement to the bank.[2a] Their contract of this nature can be subsequently avoided by the bank, solely on the ground of further fraud or dishonesty of the compounding officer occurring in the negotiation itself.[3]

Again it not unfrequently occurs that the wrongful or erroneous act of an officer causes a loss to the bank which he can be held liable to reimburse, but which there is reason to believe can only be recovered by a suit against some other third party. But if recourse is had to the suit against the third party, then the testimony of the officer in fault may be absolutely essential, or at least very desirable, to secure the success of the bank; whereas on the ground that he is a party immediately interested in the result of the litigation, he must in all probable expectation be rejected at the trial as an incompetent witness, unless he is first legally and fully released from his liability to the corporation. In this dilemma it is the duty of the directors to consult solely the comparative ultimate probability of securing reimbursement to the bank from the defendant or from the officer. It may be that the amount of the loss is greater than can possibly be recovered from the officer or from his bondsmen, while the other defendant would be amply able to pay it. It may be that the result of the suit is doubtful; or it may be that only a successful result can in reason be anticipated. Upon the consideration of such facts, the directors must conclude whether or not worldly wisdom would lead them to release the claim of the bank against the officer, or to abandon the notion of the other suit, or to sacrifice in its prosecution the advantage of his evidence. If they choose the first course, then it is not only in their power, but it becomes their duty, to execute to him a full, valid, and sufficient release from his liability. We say they must be guided solely by their notion of worldly wisdom in the case; unless by direct sanction from the stockholders, their feeling towards the officer, and their opinion of his conduct and character, cannot be allowed any weight whatsoever; and this equally whether this feeling

[2a] The directors of a bank have a right, in their discretion, to allow an officer who has been removed, compensation to which he is not entitled in order to obtain a settlement and secure what he owes the bank on account of overdrafts. Jones *v.* Johnson, 86 Ky. 530, 6 S. W. 582.

[3] Frankfort Bank *v.* Johnson, 24 Me. 490.

and opinion would lead them to punish him to the utmost extent of their power, or to pity and relieve him. The question is purely of dollars and cents, not of moral desert, of vindictiveness, or of commiseration.[4] Neither have they any power to release an original subscriber to the capital stock nor to make any arrangement with him by which the corporation, its creditors, or the State, shall lose any of the benefits of his subscription.[5]

Pledge. Assignment, etc. of Bank's Property

§ 120. The board of course has power to part with or to pledge the property of the bank in the ordinary and due course of business, and for proper purposes. So it may assign or transfer any part or the whole of the corporate assets, of whatever description of property they may consist, in order to pay corporate debts, or to secure creditors having preferred claims. Its rights and powers in this respect are co-ordinate with the rights and powers enjoyed by individuals in the same situation. Whatever a merchant or a mercantile firm, owing largely or more than they can pay, could legally do with their property to pay or secure their creditors, all or any of them, the board of directors can legally do with the funds of the bank.[1] This is the rule of common law. Of course it may be modified by legislative enactments imposing peculiar duties or restrictions upon institutions seriously indebted, in failing circumstances, or fully insolvent.

The directors of an insolvent savings bank may in good faith assign the assets of the bank for the benefit of creditors, without first obtaining the consent of the stockholders.[2] But they cannot without the consent of the stockholders pledge the future dividends of the bank to meet a deficit in capital.[3]

§ 121. **Issue of Bank Notes or Bills a Function of the Directors.** — If the bank has the legal authority to issue its bills or notes for circulation as a currency, the power to make the issue is one

[4] Lewis *v.* Eastern Bank, 32 Me. 90.

[5] McNulta *v.* Corn Belt Bank, 164 Ill. 427, 45 N. E. 954.

[1] § 120. Stevens *v.* Hill, 29 Me. 133; Dana *v.* Bank of United States, 5 Watts & S. (Pa.) 223; Sargent *v.* Webster, 13 Met. (Mass.) 497; Merrick *v.* Bank of the Metropolis, 8 Gill (Md.) 59; Bank Commissioners *v.* Bank of Brest, Harr. Ch. (Mich.) 106; Parker *v.* Carolina Savings Bank, 53 S. C. 583, 31 S. E. 673 (1898).

[2] Descombes *v.* Wood, 91 Mo. 196 (1886). See Winston *v.* Gordon, 115 Va. 899, 80 S. E. 756 (1914).

[3] Brown *v.* Bradford, 103 Iowa 378, 72 N. W. 648 (1898).

of the ordinary and inherent functions of the board, which the public has a right to presume is vested in, and will be honestly exercised by, the directors. The bank is held to warrant their fidelity. If the issue is attended with any error, neglect, or fraud, the resulting loss is that of the bank. For example, if there be, from any of these causes, an over-issue, the bank must yet redeem all the notes in the hands of innocent holders.[1] The transaction, falling within the ordinary scope of directorial authority, is one wherein the bank guarantees both the integrity and the accuracy of its agents.

§ 122. They may make arrangements with other banks to collect notes and dividends, to redeem their bills, transfer stocks, or for any other business usual or proper for one bank to transact with another.[1]

§ 123. **Directors may for Cause discharge any Employee at any Time.**[1] — But the power of the directors over the president, at least under our present National Banking Act, is greater. Him, it has been declared, they may remove absolutely and at any time by their own sole action.[2] A clause in the articles of association, giving them this power, is valid, and will sufficiently authorize them to exercise it. But such a clause is, in fact, surplusage, for the act of Congress, sect. 11, itself directly and fully bestows the power. The construction of this section, as referring to directors and not to stockholders, the court say, is quite clear. In the case cited, it was urged that no by-laws had ever been adopted by the stockholders or accepted by the comptroller of the currency; and that, until this had been done, the directors could not properly perform the act of removal. The objection, however, was overruled. It was not considered at all necessary that by-laws should have been adopted before a president could be chosen, be removed, and a successor be appointed. The by-laws, in fact, could have nothing to say about the matter at all; save, perhaps, that they might be permitted to prescribe unes-

[1] § 121. McDougald *v.* Bellamy, 18 Ga. 411.

[1] § 122. Bank of Kentucky *v.* Schuylkill Bank, 1 Pars. Sel. Cas. (Pa.) 236.

[1] § 123. Harrington *v.* First National Bank, 1 Thomp. & C. (N. Y.) 361.

[2] Taylor *v.* Hutton, 43 Barb. (N. Y.) 195.

In Missouri the board of directors have the sole power to appoint or remove a cashier. Citizens' Bank *v.* Douglas, 178 Mo. App. 664, 161 S. W. 601 (1913), citing R. S. 1909, § 1112; Lyons *v.* Corder, 253 Mo. 539, 162 S. W. 606 (1913).

sential formalities to accompany its exercise. What the act of Congress explicitly gives, not even the articles of association could take away; much less could the by-laws interfere with it. Their formal adoption, even their existence, are not necessary preliminaries to the exercise of a power which springs from a source wholly independent of them, and infinitely above them in weight and authority.

§ 124. **Quorum.** — A majority of the directors make a quorum,[0] and a majority of a quorum may act.[1]

Majority of a Quorum at Legal Meeting Rules

The bank is bound by the action of the majority of the board, taken in the manner usually adopted by the board, no matter how informal or peculiar that manner may be. An expression of the will of the majority is what the law looks for and recognizes.[2] It seems, however, that it is indispensable to the validity of any action that it should be taken by the board; that is, that *it should be the vote of a majority of a quorum at a regular and legal meeting of the board.*[2a] Thus, it has been held that the assent of a majority of the directors, expressed by them individually, and not at a regular stated meeting of the board, is not sufficient to confer upon the cashier authority to do any act which he would not have authority to do unless it were conferred upon him by the directors.[3]

[0] § 124. But only half of the directors do not make a quorum. Leary *v.* Interstate National Bank, 63 S. W. 149 (Tex. Civ. App.) (1901).

[1] Lockwood *v.* American National Bank, 9 R. I. 308.

[2] Bank of Middlebury *v.* Rutland & Washington R. R. Co., 30 Vt. 159.

[2a] Lyons *v.* Corder, 253 Mo. 539, 162 S. W. 606 (1913).

But under Kentucky law a majority of the directors acting independently may place an insolvent bank in the hands of the banking commissioner. Cartmell *v.* Commercial Bank etc. Co., 153 Ky. 798, 156 S. W. 1048 (1913).

When a bank holding a life insurance policy as security for a note went out of existence and the policy passed to a director and trustee who assigned it to a third person in consideration of an indebtedness of the director and trustee to the third person, the assignment was invalid for want of authority of the director and trustee to pledge the assets of the bank. New York Life Ins. Co. *v.* City National Bank, 121 Mo. App. 479, 97 S. W. 195 (1906).

But an act of a single director may be ratified. West Branch State Bank *v.* Haines, 135 Iowa 313, 112 N. W. 552 (1907).

[3] Elliot *v.* Abbot, 12 N. H. 549; First National Bank *v.* Lowther-Kaufman Oil Co., 66 W. Va. 505, 66 S. E. 713 (1910).

The action of three directors in dealing with a note is not binding upon the bank, especially when they keep the other fifteen directors ignorant of their doings. Traders etc. Bank *v.* Black, 108 Va. 59, 60 S. E. 743 (1908).

"The only powers conferred by statute upon the directors of a national bank are vested in them as a board, and when acting as a unit, and therefore the assent of a majority of the individual members of the board, acting separately and singly, is not the assent of the bank, and is not binding upon it." [4]

Duty to Notify Members of a Meeting. Rights of a Director

It appears that, when a quorum of the directors is assembled at a legal meeting, the action of those present will bind the bank, even though the remainder of the directors have had no notification of the meeting.[5] Though the action of the quorum may be valid as the action of the corporation under such circumstances, yet it by no means follows that the members may not themselves be in fault if the failure to notify all the members of the board was not absolutely unavoidable. It is the duty of every director to be present at every meeting of the board. Clearly the responsibility which rests upon him as a part of the government of the corporation gives him the absolute right to demand that due notice be given him of all meetings of the government for deliberation or action. But where it is a regular custom pursued for a number of years for the directors, whenever a sufficient number are present, to hold a meeting and transact business at the banking house during business hours, such custom carries with it notice to all the members of the board, unless the by-law or the law prescribes the kind of notice.[5a] The directors have no power or discretion, directly or indirectly, to debar any one of their number from the exercise of all his rights, *a fortiori* from the performance of all his duties. Not even the conviction, honestly entertained by all the rest, that one of the members is secretly hostile to the real interests of the bank, will authorize them to refuse him any of those means of scrutinizing its affairs which ordinarily pertain to his incumbency in office. Even the formality of a by-law is impotent to deny him access to the books and accounts. A by-law assuming to do so is simply invalid. The effort

[4] National Bank *v.* Drake, 35 Kans. 564; Corbett *v.* Woodward, 5 Saw. 403.

[5] National Bank *v.* Shumway, 49 Kans. 224, 30 Pac. 411 (1892); Edgerly *v.* Emerson, 3 Fost. (N. H.) 555. See State National Bank *v.* Merchants' Bank, 83 Miss. 610, 35 So. 569 (1903).

[5a] American Exchange National Bank *v.* First National Bank, 82 Fed. 961 (1897).

to exclude by such a by-law constitutes, by itself, sufficient and proper ground for the granting a writ of mandamus in favor of the excluded official; and the writ may be directed not alone to the other directors, but also to any subordinate officer who has assisted in the attempt to prevent the ousted petitioner from exercising any of his legal functions. The supposed hostility on the part of the petitioner towards the corporation, even if it should be proved, would furnish no valid cause for withholding the writ.[6]

§ 125. **Duties of Directors.**[0] — They must carefully obey the law under which the bank is organized, must act with entire good faith, and, like all other agents, they contract for reasonable capacity, skill, and care in the discharge of their duties.[0a] See § 128.

Trustees for Public Depositors and Stockholders

The high degree of confidence and responsibility resting upon directors of corporations has often led the courts to regard them as trustees, and to declare the relationship existing between them and the stockholders to be that of trustees and *cestuis que trustent*, respectively. If this can be asserted with regard to the generality of corporations, it is peculiarly and exceptionally true with regard to banking corporations, in whose solvency the whole neighboring community must be at least indirectly interested. A bank of issue may properly be regarded as a quasi public corporation. The directors of a bank are not trustees for the stockholders alone, but they owe an even earlier duty to the depositors,[0b] and, if the bank exercises the privilege of circulation, still a prior duty to the public at large. The law is, as it ought to be, very jealous in exacting the strict and thorough performance of these duties, and it is in the scrutiny of possible breaches of them that

[6] People *v.* Throop, 12 Wend. (N. Y.) 183.

[0] § 125. See Fed. Res. Act. Sec. 4, Part II. § 105.

[0a] Camden *v.* Virginia Safe etc. Corp. 115 Va. 20, 78 So. 596 (1913); Ellis *v.* Mercantile Co., 103 Miss. 560, 60 So. 649, 1915B Ann. Cas. 526, n., 43 L. R. A. (N. S.) 982. See Rankin *v.* Cooper, 149 Fed. 1010 at page 1013 (1907); Kavanaugh *v.* Gould, 147 App. Div. 281 (1911), 131 N. Y. S. 1059. Directors are not required to possess expert knowledge of bookkeeping. Mason *v.* Moore, 73 Ohio St. 275, 76 N. E. 932, 4 L. R. A. (N. S.) 597, n. (1906).

[0b] Benedum *v.* Citizens' Bank, 72 W. Va. 124, 78 S. E. 656 (1913).

A depositor may, on behalf of himself and other depositors, maintain an action against a director (president) to enforce a trust in bonds which he has purchased, for constructive fraud. Dundon *v.* McDonald, 146 Cal. 585, 80 Pac. 1034 (1905).

the rigid rules which govern trustees have been applied. It is not enough to exculpate a director, that no actual dishonesty can be shown, that he cannot be positively proved to have been influenced by interested motives. Like a trustee, he is absolutely prohibited from the performance of those questionable acts wherein his conduct may be wholly free from blame, but where the bias of self-interest is strong, and may influence him even without his own recognition of the fact. A director, who wishes to keep completely within the protection of the law, must look to something more than the mere integrity of his own intentions.

Directors Must not be Interested adversely to Bank

(*a*) The law is obliged to forbid a certain general class of actions in which the temptation is so great that it is wisely regarded as better wholly to remove human frailty from the possibility of yielding than to be continually plunging into darkling inquiries as to the probable purity and uprightness of sundry isolated transactions. It is possible that any person, being a director, might, at a meeting of the board, vote honestly and with a single eye to the bank's welfare, upon a question in which he had an individual interest to that of the corporation. It is also possible that he might intend so to vote, and yet not succeed in doing so, by reason of the unconscious obliquity of mental vision which such circumstances may often produce. But a sound precaution prefers to exchange these possibilities for a certainty. The law therefore has, with wholesome care, declared that it is a duty of a director, resulting from the employment itself, not to acquire any interest in any matter adverse to that of the bank so long as he remains in office.[0c] See § 127 *d*.

The directors of a bank who are indorsers on a note in which their interest is adverse to that of the bank cannot release themselves from liability by obtaining a renewal note without their indorsement thereon.[0d]

"A trustee may not, as such, purchase property in which he has an individual interest. The law, in such case, does not stop to inquire whether the transaction was fair or unfair, but, when

[0c] Winchester *v.* Howard, 136 Cal. 432, 64 Pac. 692 (1902); Elliott *v.* Farmers' Bank, 61 W. Va. 287, 57 S. E. 242.

[0d] First National Bank *v.* Doherty, 156 Ky. 386, 161 S. W. 211 (1913); Doherty *v.* First National Bank, 161 Ky. 202, 170 S. W. 615 (1914).

the relation is disclosed, sets aside the transaction, or refuses to enforce it at the instance of *cestui que trust.*" [1]

"A corporation in order to defeat a contract entered into by its directors on its behalf, *in which one or more of them had a private interest, is not bound to show that the influence of the director or directors having the private interest determined the action* of the board."

"The plaintiffs, therefore, are compelled to meet the question, whether, upon principles of equity, they are entitled to the aid of the court to enforce an executory contract between themselves on one side, and the defendant corporation on the other, for the sale of the property of the former, and in a case where one of the plaintiffs at the time the contract was made, was a director of the purchasing corporation, and took part in making the contract upon which the action is brought."

"We are of opinion that the contract of September 14, 1875, is repugnant to the great rule of law which invalidates all contracts made by a trustee or fiduciary, in which he is personally interested, at the election of the party he represents."

"The law stops the inquiry when the relation is disclosed, and sets aside the transaction, or refuses to enforce it at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case. It prevents frauds by making them, as far as may be, impossible, knowing that real motives often elude the most searching inquiry, and it leaves neither to judge nor jury the right to determine, upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall. It will make no difference in the application of the rule in this case, that M.'s associates were not themselves disabled from contracting with the corporation, or that M. was only one of ten directors."

Cannot Make a Profit from Trusteeship

(*b*) It is fraud for directors to secure by means of their trust, any advantage not common to the other stockholders. The law

[1] Munson *et al. v.* Syracuse, etc. R. R. Co., 103 N. Y. 58, 71–74, 8 N. E. 355.

Directors of a bank who are interested in a manufacturing company are incompetent to ratify a transaction in behalf of the bank so far as the bank thereby impairs the securities held by it. Shaw *v.* Crandon Street Bank, 145 Wis. 639, 129 N. W. 794 (1911).

will not allow private profit from a trust, and will not listen to any proof of honest intent. It is useless for a trustee to exert his wits to contrive evasions of this prohibition.[2] Not only must he refrain from voting on questions in which he is directly interested, but he must not use his influence, resulting from his official position, to secure his own ends or his private advantage. Neither, of course, can he directly or indirectly barter this influence to any outside person upon any species of consideration moving from that person to himself. It is not enough in the eye of the law to protect him, that he did not mean to prejudice the bank. If his act is open to suspicion, he will, like a trustee, be held to have violated his duty, which is, not to strive to do questionable things conscientiously, but wholly to refrain from all action or intermeddling in them of what nature soever.[3]

Attempts have often been made to prevent, by statutory enactment, or by provisions in charters, some of the more definite and openly dangerous acts which directors may sometimes be tempted to do for their own use and advantage. But this method is necessarily insufficient. The language, if specific, will cover too little; if general, will cover too much; and so in either case the phraseology will be easily perverted, and the intent evaded, on the plea of reasonable construction or necessity. The National Banking Act wisely refrains from any enactment on the subject of loans or discounts made to directors. It leaves their conduct in all particulars to the supervision of the common law, which, as it has been above laid down, must be regarded as requiring only proper and efficient enforcement to render it fully equal to the task thus imposed upon it, of securing perfect purity in the administration of the bank's affairs.

[2] Farmers & Merchants' Bank *v.* Downey, 53 Cal. 466; Koehler *v.* Black River Falls Iron Co., 2 Black 715, 17 L. ed. 339; Bain *v.* Brown, 56 N. Y. 285. But see Tenison *v.* Patton, 95 Tex. 284, 67 S. W. 92 (1902), holding that a director who sells property as a trustee for the bank is not, as a matter of law, liable to the bank for the profits gained by him through his services in its resale, but the question is one of fact, he having the burden to show the fairness of the transaction.

[3] Butts *v.* Wood, 38 Barb. (N. Y.) 181; *Ex parte* Bennett, 18 Beav. (N. Y.) 339; Benson *v.* Heathorn, 1 You. & C. Ch. 326; York Railway Co. *v.* Hudson, 19 Eng. L. & Eq. 361, 16 Beav. (N. Y.) 485; Richards *v.* New Hampshire Ins. Co., 43 N. H. 263; Baird *v.* Bank of Washington, 11 Serg. & R. (Pa.) 411; *In re* Grant, 7 Moore, P. C. 141; *Ex parte* Robinson, 2 De G. M. & G., 517.

May Take a Loan from Bank

(*c*) In the absence of legislative prohibition,[3a] there is no rule of the common law which prevents the making a loan or discount to a director any more than to any other person.[3b] Only, a director applying for such a loan must not vote or officially aid in the discussion concerning its allowance. The same principles of law will be applied to this as to other loans; but they will be rigidly enforced, and the proceedings will be severely scrutinized.[4] He must behave himself strictly like any other outside customer of the corporation. He must cause his request to be acted upon by the majority of his co-directors, strictly exclusive of himself. It is probable that any circumstance of impropriety or suspicion attendant upon the fact of his making the application at all, or upon the manner of making it or procuring its acceptance, would be construed with a degree of stringency, as against him, greater than would be exercised towards an ordinary outside borrower. Under any circumstances, favoritism and fear of offending are too likely to have some influence in such a transaction, and even the suspicion of them cannot be too carefully guarded against. Prudence no less than right feeling should prevent the applicant from even being present at the discussion and vote.

When Loan to Director is Prohibited, Loan to Another for Use of a Director is not Unlawful

(*d*) If a statute prohibits loans to directors, a loan to a firm in which a director is one of the co-partners is illegal.[5] But the mere fact that the director is to be ultimately benefited by a loan is not *per se* enough to make the loan improper or invalid, even when loans to directors are prohibited by law. If the board is satisfied with the credit or securities offered by A., they may discount his note, although the amount received by him is to go to the use and into the possession of one of themselves. The

[3a] In New York, by statute, a director or officer (teller) of a bank cannot borrow without the consent of a majority of the board of directors. But if he does so the transaction is not void and he and the indorsers on his note may be compelled to repay. People's Trust Co. *v.* Pabst, 113 App. Div. 375 (1906), 98 N. Y. S. 1045.

[3b] Elliott *v.* Farmers' Bank, 61 W. Va. 641, 57 S. E. 242 (1906). See Linderman *v.* Rusk, 125 Wis. 210, 104 N. W. 119 (1905).

[4] See Conyngham's Appeal, 57 Pa. St. 474.

[5] Bank Commissioners *v.* Bank of Buffalo, 6 Paige (N. Y.) 497.

question is, Who is the real debtor to the bank? not, What use will the debtor make of the borrowed funds? Accordingly, where a statute forbade any director to "become indebted or liable" to the bank for a sum exceeding fifty per cent of the amount of the capital stock of the bank owned by him, and a note was given to the bank by other parties, though in fact the debt was for the benefit of a director, it was held that this was not an illegal evasion of the statute, inasmuch as the note and the claim thereon of the bank were good against the signers. The case is very poorly reported, but this point seems to be deducible from it.[6]

Illegal Loan not Necessarily Void

(*e*) A prohibition in a bank charter forbidding a loan to be made to an officer of the bank does not render the contract whereby such loan is made null and void.[6a] The charter of a bank in Maryland contained such a prohibition, and further provided a penalty, as for a crime, to be inflicted on any officer who should be convicted of breaking this law. A loan was made to a director, and he sought to defend in a suit brought to recover the amount, on the ground that the whole transaction, being illegal, was null and void, and that he could not be holden. But the court ruled this defence to be absurd and inadmissable.[7] Yet it seems that, if by reason of this illegal act an innocent third party be prejudiced, such third party may be recouped at the cost of the bank.[8] If the amount of the loan, or any part of it, be lost to the bank, it is obvious that the loss falls on the shareholders, who should be permitted to have their remedy in some practicable shape.

§ 126. **Duty of Directors concerning Unauthorized Illegal Acts of Officers.** — It will often happen that a subordinate officer will do an act either illegal or fraudulent, which is of such a nature, or done in such a manner, that it does not necessarily bind or affect the bank. Thus the conduct of a single officer may be such that, if it could be construed as the action of the corporation, it would cause a forfeiture of the charter; but if it be without the direction or privity, *a fortiori* if it be contrary to the actual orders,

[6] Pemigewassett Bank *v.* Rogers, 18 N. H. 255.

[6a] See *Ultra vires*, § 722.

[7] Lester *v.* Howard Bank, 33 Md. 558; Brittan *v.* Oakland Bank of Savings, 124 Cal. 282, 57 Pac. 84 (1899).

[8] Albert *v.* Savings Bank, 2 Md. 160.

of the board of directors, the punishment will be meted solely to the wrong-doer, and it will be considered that the nature of the case furnishes no ground for a proceeding for forfeiture or penalty against the bank itself. But whenever knowledge of the commission of an act of this description, any or all the possible results of which might be averted from the bank, is brought home to the directors, it is incumbent upon them at once to disavow the doings of their officer on behalf of the body corporate, to decline to allow the corporation to receive any benefit from them, and, so far as can be done reasonably and without injury, to seek to undo the transaction if it be still inchoate or imperfect.

Must not Retain the Benefit or the Wrong-doer

(*a*) If the whole affair is completed, and can no longer be repudiated or undone, or if no good or just end could be attained by the repudiating or undoing when knowledge of it first reaches the board, still it is their duty promptly to remove the official who was guilty of the misdemeanor. If they neglect these steps, if they knowingly suffer the bank to reap advantage from the wrongful conduct, or if they continue to retain the wrong-doer in service of the bank, they will be regarded as sanctioning and adopting his acts on behalf of the bank, and it will be affected by these precisely as if they had been originally done under direction, or with the cognizance, approval, or collusion of the corporate government.[1]

Constructive Knowledge

(*b*) The cited cases also perhaps suffice to sustain a doctrine similar to that which we laid down in discussing the possible allegation of directors that they were ignorant of the existence of a custom and usage prevalent in their bank. Such an excuse, it is intimated, would be utterly insufficient to shield the bank from the natural consequences of its officer's wrongful act. If the ignorance of the directors that a breach of law or of the charter has been committed is due only to their own neglect of their obvious duty in the premises, they, *i.e.* the bank, will not be permitted to benefit by their own laches. If they ought to have known, and have no sufficient excuse for not knowing, the law will deal with the corporation precisely as if they had actually

[1] § 126. Bank Commissioners *v.* Bank of Buffalo, 6 Paige (N. Y.) 497; Robinson *v.* Bealle, 20 Ga. 275.

known. Thus if it be illegal for a loan or discount to be made to a director beyond a certain amount, and such a loan or discount is actually made, the fact that the board had neglected to examine the books, and so did not know that the accounts of the bank with this director showed so large a loan already outstanding to him, is no defence whatsoever in a proceeding by the bank commissioners for the dissolution of the corporation.[2]

Cannot Increase Capital or Make Other Radical Change

§ 127. **What the Board cannot do.** — The board of directors is limited in its authority to the management and transaction of the ordinary business for which the company was created, and which it is wont to transact; including, of course, such matters as may be necessarily incidental thereto.[0] It cannot effect great or radical changes in the organization of the company, although such changes are lawful under the charter or organic law, unless the same be consented to by the shareholders. For example, where a bank is chartered with a certain capital, but with power to increase this capital, and nothing is said as to the manner in which this power may be exercised, the directors have not authority to determine upon and make such increase; it must be done by action of the shareholders.[1] And an assessment on stockholders, required by a notice from the comptroller, under Rev. St. U. S. § 5205, is invalid if made by the directors of a bank. Such assessment must be made by the stockholders themselves.[1a]

Cannot Give Away the Bank's Property

(*a*) Directors can use the funds and property of the bank only for proper banking purposes, and for the strict furtherance of the business objects and financial prosperity of the corporation.[1b]

[2] *Ibid.*

[0] § 127. Bank of Commerce *v.* Hart, 37 Neb. 197, 55 N. W. 631 (1893); Merchants' Bank *v.* Rudolf, 5 Neb. 527.

[1] Eidman *v.* Bowman, 58 Ill. 444; and see Gray *v.* Portland Bank, 3 Mass. 364.

[1a] Hulett *v.* Bell, 85 Fed. 98 (1898).

The directors of a state bank have no inherent authority to make an assessment upon the capital stock to make up a deficiency arising from the impairment of the capital. Slette *v.* Larson, 125 Minn. 271, 146 N. W. 1093 (1914).

[1b] Where directors spend money of the bank in prospecting for ore in a mine owned by the bank, in which mine no ore of value has ever been

Their discretion and power to manage its affairs extend only to the conducting those affairs in the best manner that their knowledge, foresight, and observation can suggest, to the end of increasing the profits and enhancing the value of the investments which have been intrusted to their charge by others. They cannot use any portion of the money for such objects of usefulness or charity, or the like, as they may consider worthy of encouragement and aid. All their transactions must be strict matters of business. They cannot make gifts from the corporate property.[1c] They cannot, without authority from the stockholders, subscribe money to any objects, however meritorious, unless with the immediate view and expectation of thereby furthering the actual worldly and material well-being of the bank. They are trustees of the property of others for this sole and only purpose, and if they appropriate any portion of the property for any other purpose whatsoever, however intrinsically deserving, it is yet a deviation from their obvious duty, both legal and moral, for it is nothing else than a clear breach of a plain and simple trust.[2]

Also a case of misappropriation of the funds of the corporation has been held to be where the directors, apprehensive that a suit was to be instituted against them by the stockholders, used corporate funds to retain counsel for their own defence.[3] A clearer case of a wrongful misapplication and deflection of trust money from the purposes of the trust is not likely to occur.

Cannot Make Bank a Gratuitous Surety

(*b*) A cognate rule forbids the directors needlessly or gratuitously to assume either actual or contingent liabilities on behalf of others. If they could ever have the right to do so, it could be only under circumstances of urgent necessity, and where interests of the bank seemed to be in some degree involved, so that a jury would be willing to regard the exceptional excuse as sufficient.[4]

found, they are personally liable for the money to the bank or its receiver. Cooper *v.* Hill, 94 Fed. 582 (1899).

[1c] Directors cannot legally make a contribution for the purpose of inducing the construction of a railroad. Arkansas etc. Railroad *v.* Farmers' etc. Bank, 21 Okla. 322, 96 Pac. 765, 129 Am. St. Rep. 782 (1908).

[2] Frankfort Bank *v.* Johnson, 24 Me. 490; Bedford R. R. Co. *v.* Bowser, 48 Pa. St. 29.

[3] Percy *v.* Millaudon, 3 La. 568.

[4] Stark Bank *v.* U. S. Pottery Co., 34 Vt. 144.

Effect of Wrongful Act as between Bank and Third Parties

(*c*) If a director or the board act beyond their power or contrary to their duty, third parties may still hold the bank on the transaction, if on the facts as actually or constructively known to such third parties there was nothing to notify them of the wrongfulness of the transaction. Where the directors permit an officer to hold himself out to the public as being invested with absolute power to manage and control its affairs, in such a manner and for such a length of time, as to lead innocent persons to make contracts with such officer, the bank cannot repudiate the contracts by invoking any by-law of the corporation which the directors themselves have negligently allowed to fall into disuse.[4a]

(*d*) If a director commits a breach of duty in advocating, or voting upon, a measure in which he is so interested that he ought to have regarded himself as wholly excluded from the deliberation and decision upon it, yet the action of the board thereon will be valid and binding upon the corporation in favor of any innocent third person, not cognizant of or a party to the wrongfulness of the proceeding. Thus, in a case where a director was jointly responsible with a debtor upon a debt owing to the bank, he was present and voted at the meeting when the board settled the debt by taking a conveyance of the debtor's real estate. It was held that the fact of his voting, however wrongful in him, nevertheless did not avoid the contract as towards the debtor, unless fraudulent collusion on the part of the debtor should be shown. The debtor had nothing to do with the correctness of the dealings taking place between the bank and its own agents and officers. He had only to satisfy himself that the board was acting within its powers.[5]

Ultra Vires by Circumstances Unknown

(*e*) If the directors give away the bank's property, or make the bank an accommodation indorser, or make an illegal loan or purchase, or otherwise exceed their authority in such a way that the transaction is on its face regular, and apparently within the scope of the directorial authority, and no circumstances affect third parties with notice of its wrongfulness, the transaction as to such parties would bind the bank.[5a]

[4a] Cox *v.* Robinson, 82 Fed. 277, 286 (1897).
[5] Baird *v.* Bank of Washington, 11 Serg. & R. (Pa.) 411.
[5a] Seeberger *v.* McCormick, 178 Ill. 404, 53 N. E. 340 (1899).

Ultra Vires by Circumstances Known

(*f*) But if the real nature of the act were known to the outsider, he would be held to a knowledge of its illegality arising from its not being within the ordinary agency conferred by the corporate principle upon its official agents. For directors, though they are the government of the corporation, are yet, no less than any subordinate officers, its agents, with a definite scope to their agency, and can only act legally within the scope.[6] If their act is such that it is the duty of the party dealing with them to know that it falls without the ordinary limits of directorial power, he will be affected by its invalidity. If the facts are known to him which show that as matter of law the directors are undertaking an act of this description, he deals with them at his own peril if he neglects to satisfy himself that they have received a special and extraordinary authority in the particular case. If they have not, any loss he may incur is only the natural result of his own laches. Thus it is a principle of law that the directors can only use funds of the bank for legitimate banking purposes. If they borrow money intending to use it for other purposes, and the lender is aware of this intent, then their use of it accordingly will relieve the bank from indebtedness upon the loan.[7] See on this topic, *Ultra vires*, § 722.

§ 128. **Liability of Directors.**[0] — If bank directors do not manage the affairs and business of the bank according to the directions of the charter and in good faith, they will be liable to make good all losses which their misconduct may inflict upon either stockholders or creditors, or both.[1] But they are not liable

[6] Salem Bank *v.* Gloucester Bank, 17 Mass. 1; Bank of Kentucky *v.* Schuylkill Bank, 1 Pars. Sel. Cas. (Pa.) 180; Ridley *v.* Plymouth Grinding & Baking Co., 2 Exch. 711.

[7] Bank of Australasia *v.* Breillat, 6 Moore P. C. 197.

[0] § 128. For the liability of directors when a national bank violates the Federal Reserve Act see Fed. Res. Act, Sec. 2, Part II. § 92.

[1] Hodges *v.* New England Screw Co., 1 R. I. 312; 3 *id.*, 9; Bank of St. Mary's *v.* St. John, 25 Ala. 566; Attorney-General *v.* Wilson, 1 Craig & Ph. 1; 10 L. J. N. S. 53, 4 Jur. 1174; Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 468 (1896); McDonald *v.* Rankin, 7 Montreal L. R. (S. C.) 44; Marshall *v.* Farmer's Bank, 85 Va. 676, 8 S. E. 586, 17 Am. St. Rep. 84, n. (1889); Elliott *v.* Farmers' Bank, 61 W. Va. 641, 57 S. E. 242 (1906); Ellis *v.* Mercantile Co., 103 Miss. 560, 60 So. 649, 1915B Ann. Cas. 526, n.; Bank of Des Arc *v.* Moody, 110 Ark. 39, 161 S. W. 134 (1913); Daugherty *v.* Poundstone, 120 Mo. App. 300, 96 S. W. 728 (1906); Emerson *v.* Gaither, 103 Md. 564, 64 Atl. 26, 8 L. R. A. (N. S.) 738 (1906); Cun-

for frauds of an officer unless they have been guilty of gross neglect.[1a] Neither are they liable if no loss results to the bank from their negligence.[1b]

ningham *v.* Shellman, 164 Ky. 584, 175 S. W. 1045 (1915); Lippitt *v.* Ashley, — Conn. —, 94 Atl. 995 (1915); Gund *v.* Ballard, 80 Neb. 385, 114 N. W. 420 (1907); Holmes *v.* McDonald, 226 Ill. 169, 80 N. E. 714 (1907); Wickliffe *v.* Turner, 154 Ky. 571, 157 S. W. 1125 (1913); Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567 (1901).

The making of a loan in good faith to a corporation financially unsound upon property, security or reliable individual indorsement is not negligence. Warren *v.* Robison, 25 Utah 205, 70 Pac. 989 (1902).

Directors are required to exercise reasonable care and business judgment, but nothing further than this. Braswell *v.* Pamlico Banking Co., 159 N. C. 628, 75 S. E. 813, 42 L. R. A. (N. S.) 101 (1912); they are not liable to creditors for mere non-feasance. Stone *v.* Rottman, 183 Mo. 552, 82 S. W. 76 (1904).

In Arkansas, by statute, it is the duty of directors to manage the affairs of the bank, and they cannot discharge that duty by delegating it to others. Bailey *v.* O'Neal, 92 Ark. 327, 122 S. W. 503, 135 Am. St. Rep. 185 (1909).

If the directors wilfully use the property which is the subject of trust for an unauthorized purpose and a loss ensues they are liable for the loss to the depositor, or his assignee, and it is immaterial that the depositor became such after the misappropriation; nor will a consent of the stockholders to the misappropriation bar the right of creditors. Winchester *v.* Howard, 136 Cal. 432, 64 Pac. 692, 89 Am. St. Rep. 153 (1902).

The liability of the directors is an asset of the insolvent bank enforceable by a trustee for the benefit of its creditors; and if the trustee does not enforce it the stockholders may do so by an answer in the nature of a cross bill. Clark *v.* Bank of Union, 72 W. Va. 491, 78 S. E. 785 (1913). But in such a case the statute of limitations is well pleaded. Stone *v.* Rottman, 183 Mo. 552, 82 S. W. 76 (1904).

The creditors have no right to sue the directors of an insolvent corporation which has passed into the hands of a receiver, unless the receiver, upon proper request, refuses to sue, or unless such request would be unavailing. Saunders *v.* Bank of Mecklenburg, 113 Va. 656, 75 S. E. 94 (1912); Murred *v.* Traders' etc. Bank, 113 Va. 665, 75 S. E. 97 (1912).

In a suit against the directors of a bank for negligence in conducting the business of the bank it is not necessary to allege what particular loss was by the negligence of a particular officer or who was on the managing board at the time of the loss, or to allege all the losses complained of. Sigwald *v.* City Bank, 74 S. C. 473, 55 S. E. 109 (1906).

[1a] Savings Bank *v.* Caperton, 87 Ky. 306, 8 S. W. 885 (1888); Robinson *v.* Hall, 59 Fed. 648; Swentzel *v.* Penn Bank, 147 Pa. St. 140, 23 Atl. 405, 415.

Directors cannot fairly be said to be guilty of gross neglect if they perform their duty in the same manner as such duties are ordinarily performed by all other directors of other banks of the same city. Delvin *v.* Moore, 64 Or. 433, 130 Pac. 35 (1913).

[1b] Wallace *v.* Lincoln Savings Bank, 89 Tenn. 630–648, 15 S. W. 448 (1890).

Careless Supervision

If the directors do not use ordinary diligence to know[1c] the conduct of officers and what the bank books show,[1d] and to control their subordinates, and loss results, they are liable.[2] The degree of care required of directors depends upon the subject to which it is to be applied, and each case is to be determined in view of all the circumstances.[2a]

[1c] If the directors know that the president and vice president of the bank are engaged in a stock speculation with the funds of the bank they are liable for losses thus occasioned. McKinnon *v.* Morse, 177 Fed. 576 (1910).

[1d] Knowledge of all the affairs of the bank or what its books and papers would show cannot be imputed to a director for the purpose of charging him with liability. Mason *v.* Moore, 73 Ohio St. 275, 76 N. E. 932, 4 L. R. A. (N. S.) 597, n. (1906). But it is the duty of the directors to examine the papers and effects of the bank and to familiarize themselves with its business and affairs. Spongberg *v.* First National Bank, 18 Idaho 524, 110 Pac. 716, 1912A Ann. Cas. 95, n.

[2] United Society *v.* Underwood, 9 Bush (Ky.) 609; Gibbons *v.* Anderson, 80 Fed. 345; Wheeler *v.* Aiken Co. Bank, 75 Fed. 781; Empire State Savings Bank *v.* Beard, 81 Hun (N. Y.) 184; Ellis *v.* Mercantile Co., 103 Miss. 560, 60 So. 649, 1915B Ann. Cas. 526, n.; Lyons *v.* Corder, 253 Mo. 539, 162 S. W. 606 (1913); Franklin *v.* Caldwell, 123 Ky. 528, 96 S. W. 605, 5 L. R. A. (N. S.) 458, n. (1906); Stone *v.* Rottman, 183 Mo. 552, 82 S. W. 76 (1904); Rankin *v.* Cooper, 149 Fed. 1010 (1907).

One who has been elected a director but has never received notice of the fact and has never acted in the capacity of a director is not liable for such losses. Bank of Des Arc *v.* Moody, 110 Ark. 39 (1913).

When a deposit is made there is a direct privity of relation between the directors and the depositors, and the latter may sue the former for negligently permitting the officers to loan money contrary to law resulting in loss. Boyd *v.* Schneider, 131 Fed. 223 (1904).

[2a] Briggs *v.* Spaulding, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. 924 (1891); Mason *v.* Moore, 73 Ohio St. 275, 76 N. E. 932, 4 L. R. A. (N. S.) 597, n. (1906); Delvin *v.* Moore, 64 Or. 433, 130 Pac. 35 (1913); Rankin *v.* Cooper, 149 Fed. 1010 (1907); Kavanaugh *v.* Gould, 147 App. Div. 281 (1911), 131 N. Y. S. 1059.

If a director knows of the insolvency of a bank and takes no steps to forbid a continuance of the business it seems that he is liable for loss to one who thereafter deposits in ignorance of the situation. Cassidy *v.* Uhlmann, 170 N. Y. 505, 63 N. E. 554 (1902).

Directors must cause an examination of the condition and resources of the bank to be made with reasonable frequency. Delvin *v.* Moore, 64 Or. 433, 130 Pac. 35 (1913); Campbell *v.* Watson, 62 N. J. Eq. 396, 50 Atl. 120 (1901); Rankin *v.* Cooper, 149 Fed. 1010 (1907).

They are bound to exercise that degree of care in the business affairs of the bank that ordinarily prudent and careful men would exercise in affairs of like importance. Smalley *v.* McGraw, 148 Mich. 384, 111 N. W. 1093 (1907); Kavanaugh *v.* Gould, 147 App. Div. 281 (1911), 131 N. Y.

They may be held to account to an injured party in a court of chancery,[3] or they, or any one of their number who shared in the wrongdoing, may be sued at law for damages.[4] But for excusable mistakes concerning the law, and for many errors strictly of discretion, they are not liable.[4a] Though in cases in which their action has been so grossly ill advised as to warrant the imputation of fraud, or to show a want of the knowledge absolutely necessary for the performance of their duties, so great that they were not justified in assuming the office, they may be held responsible.[5] They are required simply to show a reasonable capacity for the position they accept; to use in it their best discretion [5a] and industry; to show the scrupulous *bona fides* and conscientiousness in every matter, however minute, which is exacted rigorously from all trustees of the property of others; and to obey accurately the requisitions of the charter, or of the general law under which they are organized.

S. 1059. They are not, however, bound to exercise the same care that a man of prudence would exercise in his own business. Stone *v.* Rottman, 183 Mo. 552, 82 S. W. 76 (1904). But the failure to comply with statutory requirements is actionable negligence. Lyons *v.* Corder, 253 Mo. 539, 162 S. W. 606 (1913).

And in Arkansas, by statute, directors are liable for a series of connected acts of negligence from which it may be inferred that the negligence was intentional. Bailey *v.* O'Neal, 92 Ark. 327, 122 S. W. 503, 135 Am. St. Rep. 185 (1909).

Whether or not the president of a bank is negligent in failing to see securities listed in a false report to the superintendent of banking is a question for the jury. Davenport *v.* Prentice, 126 App. Div. 451 (1908), 110 N. Y. S. 1056.

[3] Hodges *v.* New England Screw Co., *supra;* Bank of St. Mary's *v.* St. John, *supra;* Bank of Des Arc *v.* Moody, 110 Ark. 39, 161 S. W. 134 (1913); Rankin *v.* Cooper, 149 Fed. 1010 (1907).

The statute of limitations will be no defence where the negligence of a majority of directors continued until the appointment of a receiver and was unknown to the creditors. Rankin *v.* Cooper, *supra.*

If the bank and receiver refuse to bring action the depositors and stockholders may do so. Ellis *v.* Mercantile Co., 103 Miss. 560, 60 So. 649, 1915B Ann. Cas. 526, n.

[4] Conant *v.* Seneca County Bank, 1 Ohio St. 298; Warren *v.* Robison, 25 Utah 205, 70 Pac. 989 (1902).

[4a] Witters *v.* Sowles, 31 Fed. 1; Wallace *v.* Lincoln Savings Bank, 89 Tenn. 630, 15 S. W. 448 (1890); Williams *v.* McDonald, 42 N. J. Eq. 392, 7 Atl. 866.

[5] Godbold *v.* Branch Bank, 11 Ala. 191; Smith *v.* Prattville Manufacturing Co., 29 *id.*, 503.

[5a] There is a strong presumption that directors exercise their best judgment in conducting the affairs of the bank. Delvin *v.* Moore, 64 Or. 433, 130 Pac. 35 (1913).

Wrongful Dividend

(*a*) For example, if directors declare a dividend at a time when the bank is so far embarrassed that such a needless disbursement of money must be regarded as an act of either fraud or folly, and which could have been advocated by no man who was not either dishonest or grossly incapable, they may be held liable for the consequent loss to the corporation,[6] and to the depositors.[6o] The act is not to be excused,[6a] for it must be either fraudulent or the result of such excessive unfitness as to become the legal equivalent of fraud. But where the directors declare a dividend because of bad judgment, and not bad faith, as to the condition of the assets, they are not liable.[6b]

(*b*) Collateral to this right of action for the improper declaration of a dividend is the right of the shareholder to protection for the future in a court of equity. It is one of the very few cases in which he can interfere to control the judgment of the board. If he makes out a proper case, he may have an injunction against the directors, prohibiting the declaring of other dividends thereafter. The proceeding for this purpose is an independent one, and does not operate as a waiver of his right of action at law to

[6] Gunkle's Appeal, 48 Pa. St. 13; Dykman *v.* Keeney, 10 N. Y. App. Div. 610.

In Wisconsin directors are liable for payment of dividends out of the corporate property before the capital stock has been fully paid in. Williams *v.* Brewster, 117 Wis. 370, 93 N. W. 479 (1903).

In Georgia it is criminal for the president and directors to declare a dividend from funds other than profits. Cabaniss *v.* State, 8 Ga. App. 129, 68 S. E. 849 (1910).

[6o] Boyd *v.* Schneider, 131 Fed. 223 (1904).

[6a] If directors declare dividends in violation of statute they will not be permitted to shield themselves from liability upon the ground that they did not knowingly violate its provisions. Franklin *v.* Caldwell, 123 Ky. 528, 96 S. W. 605 (1906).

[6b] Witters *v.* Sowles, 31 Fed. 1.

[6c] A note of the stockholders to pay the taxes on stock is equivalent to the declaration of a dividend. Dividends are held in trust for the stockholders, and a demand is doubtless essential as a condition precedent to bringing suit, unless there has been a refusal to pay. A stockholder may sue for his dividends at any time within the period of the statute of limitations unless he has misled others to their prejudice. Redhead *v.* Iowa National Bank, 127 Iowa 572, 103 N. W. 796 (1905).

[6d] The debt does not pass with the assignment of the shares of stock. Redhead *v.* Iowa National Bank, 127 Iowa 572, 103 N. W. 796 (1905).

If the bank gives time checks payable at certain dates, for the dividends, the dividends belong to the bank and may be taxed to it. Greneda Bank *v.* Adams, 87 Miss. 669, 40 So. 4 (1905).

recover damages for the injury sustained from the payment of the dividend already declared. For apparently this act, however wrongful, cannot be undone after the measure has passed the corporate government. The right of each shareholder to receive his dividend, is perfect so soon as there has been a formal vote to pay it.[6c] It is rendered a debt owing from the bank to him.[6d] After this stage it is too late for a court of equity to enjoin the disbursement of the dividend, certainly where only one shareholder is before the court.[7]

Wrongful Issue of Bills

(*e*) So again if the charter forbids the issue of bills for circulation before a certain portion of the capital stock has been subscribed and paid in, in specie, an issue before that time will make the directors personally liable to redeem any of the bills which the bank is unable to pay in the due and ordinary course of its business. A statutory requisition of a nature so plain and simple as this cannot be excusably broken. If broken, the breach cannot be regarded as a mistake of law.[8]

It has been declared in a Georgia case, that with the expiration of the charter of the bank the liability of the directors for over-issues ceases also.[9] One judge dissented from this opinion, and it must be confessed that it is difficult to believe that it is sound law. An over-issue of circulating bills is a very grave offence. It can hardly be made honestly, and even if it is, the gross neglect of duty, which must open the door to it, deserves a scarcely lighter responsibility than actual fraud. But if there is to be any limitation to a liability thus created, surely it cannot accrue until such time as no person on behalf of the institution has the duty of redeeming its notes, so that those still remaining out may properly be supposed by the community to be utterly worthless. Statutory or charter provisions, or judicial decrees, often place this time at a date much later than that of the expiration of the charter. So long as the community have a right to look to any one to redeem the bills of the bank, surely they should have the right to look to a director who has taken part in an over-issue.

[7] Fawcett *v.* Laurie, 1 Drew. & S. 192.
[8] Schley *v.* Dixon, 24 Ga. 273.
[9] Moultrie *v.* Hoge, 21 Ga. 513.

Mistakes of Law

(*d*) Mistakes as to what is the law serve to excuse in cases where correct knowledge could be reasonably expected only from a professional man, and even in such cases, if the directors feel any doubts, they may be guilty of neglect if they fail to seek and be guided by competent legal advice. Thus the board of a bank voted to pay a director for services; the court held that he could not be legally paid. But the point was purely legal; the directors had acted honestly and without negligence in the matter, and they were accordingly exculpated from blame or responsibility.[10] But ignorance of any fact in the bank's affairs which it is their duty to know, can never be set up by them in defence or exculpation for any act which the existence of that fact should have prohibited.[11] And while they are not responsible for their failure to collect a debt because of usury included therein, they are liable for their own infringement of a statute against usury.[11a]

Not Negligence

(*e*) If the cashier is properly selected, there is no negligence in letting him select, and hire, and pay fom his salary, the clerks and servants of the bank.[12] Directors are not insurers of the fidelity of the agents whom they appoint, nor can they be held responsible for losses resulting from the wrongful acts and omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty.[12a]

Ill Health of a Director

(*f*) A director cannot escape liability for the results of his ignorance of the affairs of the bank, on the ground that he has

[10] Godbold *v.* Branch Bank, 11 Ala. 191.

[11] Bank Commissioners *v.* Bank of Buffalo, 6 Paige (N. Y.) 497.

[11a] Wallace *v.* Lincoln Savings Bank, 89 Tenn. 630, 648, 15 S. W. 448 (1890); Drake *v.* Bank, 9 Grant Ch. (U. C.) 116.

[12] Smith *v.* First National Bank, 99 Mass. 605; Wallace *v.* Lincoln Savings Bank, 89 Tenn. 630, 652–654, 15 S. W. 448 (1890).

[12a] Briggs *v.* Spaulding, 141 U. S. 133, 35 L. ed. 662, 11 Sup. Ct. 924 (1891); Warner *v.* Penoyer, 82 Fed. 181 (1897); Clews *v.* Bardon, 36 Fed. 617; McDonald *v.* Rankin, 7 Montreal L. R. (S. C.) 44; Stone *v.* Rottman, 183 Mo. 552, 82 S. W. 76 (1904); Warren *v.* Robison, 25 Utah 205, 70 Pac. 989 (1902); Delvin *v.* Moore, 64 Or. 433, 130 Pac. 35 (1913); Mason *v.* Moore, 73 Ohio St. 275, 76 N. E. 932, 4 L. R. A. (N. S.) 597, n. (1906).

been in ill health.[13] But where the other directors gave him leave of absence and frauds are committed during his absence, and without his knowledge, he is not responsible for them.[13a]

Non-residence

(*g*) Neither non-residence [13aa] of directors making it impracticable for them to give proper attention to the bank's affairs nor private arrangements between them and other directors or stockholders whereby they are relieved from such duties, excuses them from liability incurred by permitting false statements to be made of the bank's condition.[13b]

Solicitation of President no Excuse

(*h*) A director of a savings bank, also manager and member of the finance committee, who makes a loan prohibited by statute, is not excused on the ground that he acted at the solicitation of the president and for the alleged benefit of the bank.[13c]

Going Beyond Limit of Bank's Indebtedness

(*i*) A very common provision in banking acts and bank charters names a certain sum or ratio which the indebtedness of the bank shall never be allowed to exceed,[13d] and for any excess makes

[13] German Savings Bank *v.* Wulfekuhler, 19 Kans. 60.

A passing illness temporary in character is an excuse for the period while it lasts, but if a person becomes a confirmed invalid and remains a director he cannot escape liability. Rankin *v.* Cooper, 149 Fed. 1010 (1907).

But see Warren *v.* Robison, 25 Utah 205, 70 Pac. 989 (1902), holding that where directors after recovery of health learned of an unauthorized loan and made all reasonable efforts to collect it for the bank they were not liable.

[13a] Briggs *v.* Spaulding, 141 U. S. 133, 35 L. ed. 662, 11 Sup. Ct. 924 (1891).

[13aa] A director who spends much of his time in trips to the East has no excuse from liability. Rankin *v.* Cooper, 149 Fed. 1010 (1907). But see Warren *v.* Robison, 25 Utah 205, 70 Pac. 989 (1902), holding that where two directors were necessarily absent from the state and made all reasonable efforts to collect for the bank on an unauthorized loan they are not liable.

[13b] Houston *v.* Thornton, 122 N. C. 365, 29 S. E. 827 (1898).

[13c] Williams *v.* McDonald, 42 N. J. Eq. 392, 7 Atl. 866 (1886).

[13d] One who obtains a loan from a bank is charged with knowledge of the limitations of the amount which the bank may loan to one person; and when the bank contracts to loan one person more than the amount

the directors under whose administration it was allowed liable.[13e] Apparently directors have a salutary fear of exposing themselves to the risks of this enactment, for few suits are reported in the books. Neither are those few which are found very valuable authorities. The chief lesson that they teach is the necessity of a minute accuracy of detail in any legislation which may be undertaken for the accomplishment of an end, like this, of personal responsibility in an unremunerative employment. They are not very consistent *inter se*, nor do they easily arrange themselves under any distinct principle.

Not Relieved by Expiration of Charter or Judgment of Forfeiture

(*j*) In Neal *v.* Moultrie[14] it was declared that the liability, being statutory, was not barred for twenty years; and that the limitations which might run against a fine, a forfeiture, or a penalty had no force in this matter. Hargroves *v.* Chambers[15] decided that, in a suit against surviving directors, on the ground that all the directors had become individually liable, it was not necessary to join the representatives of deceased directors; also that certificates of deposit payable on order with interest from date formed a part of the corporate indebtedness; also that neither waste of the assets of the bank in the hands of the assignee, nor a judgment of forfeiture of franchise pronounced against the bank, nor the expiration of the bank charter, could operate to relieve the directors from their liability. It was added as a *semble*, that they would not be relieved by these events, even if the dissolution of the corporation discharged its indebtedness.

permitted by statute it is *ultra vires* and cannot be enforced against the bank nor can damages be recovered for its breach. Weld *v.* Wheelon, 27 N. D. 624, 147 N. W. 402 (1914).

If a note is given by a person for the purpose of deceiving the bank examiner as to the amount of the indebtedness of the bank the maker of the note may show that there was no consideration therefor, when sued by the bank, provided there are no creditors unsatisfied. First State Bank *v.* Morton, 146 Ky. 287, 142 S. W. 694 (1912).

[13e] It is not material whether the bank lends the money to a person and takes his note for it, or buys his paper from another. Wickliffe *v.* Turner, 154 Ky. 571, 157 S. W. 1125 (1913).

In South Dakota officers, directors or employees who knowingly permit shareholders to, at one time, become indebted to a banking corporation in a total sum of fifty per cent of the paid up capital of said bank are guilty of a felony. State *v.* McPherson, 30 S. D. 547, 139 N. W. 368 (1913).

[14] 12 Ga. 104.

[15] 30 Ga. 580.

Director Liable though Objecting

(*k*) Next we have the case of Banks *v.* Darden,[16] also decided in Georgia, but hardly destined to add much to the reputation of the learned bench of that State. The charter of the bank fixed the limit of indebtedness, and provided that "in case of excess the directors . . . shall be liable for the same in their private and individual capacity." The court held that the provision was remedial, and not penal; that the liability of the directors was joint, and not several; and that no single member of the board could escape his responsibility by proving either his absence from the meetings at which the excess was suffered to be incurred, or his dissent from the action of his co-directors. In discussing the last point, the judge waxes eloquent and picturesque in his language. He imagines a director not only absolutely innocent of collusion in the wrongdoing, but even laboring strenuously though in vain to obtain respect and obedience for the law. But, he says, even for this ill-starred individual there is no flight from the rigid vengeance of the statute. It is indeed "a bloody legal picture," yet the law is inexorable; the "pound of flesh must be had." In Michigan the judges were less Draconic in their interpretation of their similar legislation, and ventured to hold that a director was not liable for an excess created by a loan, to the making of which he had objected at the time when it was agreed upon by the board.[17]

(*l*) In Ohio the lawgivers wisely took this matter into their own hands, and laid down specifically by what means, such as publication of his dissent and the like, a director might save himself from liability for any action of the remainder of the board. The opinion in the cited case was the result of a very careful consideration of the subject, and deserves to be noticed. The statute provided that for any excess the "directors under whose administration it should happen should be liable for the same in their natural and individual capacity, in an action of debt against them or any of them." The court held that the remedy of the creditors was a penal action, and not one of contract; and that the measure of damages would be the amount of the excess of liability created by the board of which the defendant or defendants were members. The grounds on which this conclusion was based were as follows: 1. The language of the act does not declare

[16] 18 Ga. 318. [17] White *v.* How, 3 McLean, 111.

that the directors shall be personally liable on the contract of indebtedness itself which was created in excess of the legal limit, but solely for the excess itself. 2. The liability does not run to the persons holding the particular contract made in excess of the limit, but to the creditors generally; wherefore the ground of action is clearly not the original contract. 3. The amount which any creditor can recover is not the amount of his own debt, but the amount of the excess of the total liability beyond the legal limit; and this even though his own debt forms no part of the excess. 4. The liability is provided for in the manner customary in penal statutes to vindicate a violation of law. 5. The action provided is the usual action prescribed by penal statutes to recover a penalty. 6. The action of the creditor must be debt, whether his contract with the bank be such as to authorize this form or not. The court then add, that they consider that the right to bring this penal action is given to any one among the creditors who may choose singly to institute it, but for the benefit of the whole body of creditors, and to create a fund for the indemnity of all.[18] How that fund is to be saved and applied for the benefit of all, is a matter not discussed.

(*m*) In Massachusetts, a dissenting director avoids liability by notice to the bank commissioners.[19]

(*n*) In Pennsylvania, where a loan is made in excess of the legal limit, every director who *participates in* or *assents to* the wrong is personally responsible for the damage directly consequent to the bank, the shareholders, or any one else.[20]

(*o*) A recent Kentucky case,[21] Louisville National Bank *v.* Brannin, contains an excellent discussion of the liability of directors.

The charter of the "Exchange Bank and Tobacco Warehouse Co. of Louisville" provides that "the indebtedness of the corporation over and above that incurred for deposits of money shall at no time exceed their paid-up capital stock."

During the time that the bank was indebted beyond the amount of its paid-up capital stock, the president, Harvey, indorsed the name of the bank upon three bills of exchange, and they were sold to appellants, and suits were instituted by appellants against

[18] Sturges *v.* Burton, 8 Ohio St. 215. [19] R. L. c. 115, § 36.

[20] Stephens *v.* Monongahela National Bank, 88 Pa. St. 157.

[21] Louisville National Bank *v.* Brannin, Loving, & Harvey, 82 Ky. 370–375 (1884).

appellees to hold them personally bound for the bills. Appellees Loving and Bronner, who were directors, had no knowledge of the making or negotiation of the bills.

"By reason of the trustee character of the bank, the great facilities its officers have for committing frauds, the inability of the public to know its condition, and the supreme control the directors have over its affairs, it becomes the duty of the latter to so conduct the business that any misconduct cannot long continue. The banks conduct the business of this country so largely, and those dealing with them are compelled to rely on their officers so implicitly, that the extraordinary privileges accorded to them should be properly exercised.

"The services of directors are, however, usually gratuitous; they are entitled to no compensation in the absence of a contract for it, and are only required to exercise the same care that an ordinarily prudent man would in his own business of a like character.[21o]

"The appellees Loving and Bronner had no knowledge whatever of the making or negotiation of the bills sold the appellants, and never approved the same.

"The transactions were isolated, and the exercise of ordinary care upon their part did not afford them notice, or enable them to stop them; and, being isolated, it must not be presumed that they had notice of them simply because they were directors.[21oa]

"The appellee Harvey, however, stands in a different attitude. As to him it is not a question of neglect, but the violation of a known duty, and therefore a breach of trust amounting to a tort.

"If he did know its condition and the provision in its charter, and created the indebtedness, then he is certainly liable; and if he did not have such knowledge, then there was such a want of information as was absolutely necessary to the proper performance of his duty, and he is responsible for assuming to act without it.

"He assumed to act under a charter containing a provision so plain that it could not excusably be broken by him, and when it

[21o] In Missouri directors are not held to so high degree of care. Stone *v.* Rottman, 183 Mo. 552, 82 S. W. 76 (1904).

[21oa] Want of knowledge of the wrong doing of officers at the bank will not excuse the directors if it is the result of their gross inattention. Stone *v.* Rottman, 183 Mo. 552, 82 S. W. 76 (1904).

was his duty to know the condition of his company; and under such circumstances he is equally as responsible as if he had been guilty of fraud. Although acting *bona fide*, he had no right to create the debt; it was not merely an omission, but a positive violation of his duty, by which an innocent outside party is made to suffer, and one who had placed confidence in the implied assertion of authority arising from the making of the paper."

(*p*) In Missouri, the directors of a savings bank who have loaned to one person a sum greater than one-fourth of the bank's capital stock, contrary to Revised Statutes, § 916 (1879), are liable to the bank or its receiver for any loss that may accrue from such loan, although the statute itself does not provide any penalty for its violation.[21a]

The directors of a savings bank that has purchased the stock of a company which it held as security, who allow its officers to run the company, which traded in coal, for four years at a continual loss are liable for the loss in a suit by the receiver. They are also liable for sums loaned to borrowers who were at the time insolvent to the knowledge of the directors.[21ao]

The failure of directors to comply with the statutory duties of examining accounts is negligence as a matter of law and renders them liable for all losses occasioned thereby.[21aa]

(*q*) In South Carolina the loaning of over two-thirds of the capital of a bank to a single merchant is not sufficient to render the directors personally liable for resulting loss, provided the loan was made in entire good faith and honesty of purpose.[21b]

(*r*) The directors of a bank are not personally responsible to one (H.) from whom they have in good faith made an unauthorized purchase of stock, which the bank repudiated. The sale was illegal for lack of consent of the shareholders, and the contract being therefore *ultra vires*, the bank, having received no benefit from it, could not be held.

H. sued the directors, claiming that, as they had failed to bind the bank, they were themselves bound, on the rule that an agent who goes beyond his authority binds himself. The court said, that this is by no means a universal rule; the first question is always, between what parties was the contract, for the law will not make

[21a] Thompson *v.* Greeley, 107 Mo. 577, 17 S. W. 962.
[21ao] Stone *v.* Rottman, 183 Mo. 552, 82 S. W. 76 (1904).
[21aa] Lyons *v.* Corder, 253 Mo. 539, 162 S. W. 606 (1913).
[21b] Wheeler *v.* Aiker Co. Bank, 75 Fed. 781 (1896).

a new contract. In this case the agreement was clearly understood to be between the bank and H., and therefore the directors could not be held on the *contract;* but if any wrong could be imputed to the agents they would be liable. In the case at bar, however, the directors (D.) were not guilty of any misrepresentation; both H. and D. thought the contract good, *and the sources of D.'s authority were as open to H. as to D.* If an agent covenants personally, adding his representative character which he fails to sustain, he is bound on the contract; but if the language does not contain a personal undertaking it is not his contract.[c] If he *carelessly or knowingly* assumes authority he does not possess, he is liable in tort;[a] but in no case where the power of judging[b] of the agency was equal has the agent been held liable as the principal.[22] Directors are not liable in any event for over-checks permitted to customers without their authority or knowledge,[23] neither can they be held to the common law liability for hazardous, imprudent, and disastrous loans if such loans were made by their associates without their knowledge, connivance, or participation.[24]

When a bank director is not acting as a director but as the agent of another in obtaining discounts of a note he cannot be liable because he induced or permitted the bank to extend credit in excess of the legal limit fixed by statute,[25] and where one has never been notified of his election as a director and has never acted as such he cannot be held liable for failure to prevent the cashier from making bad loans.[26]

§ 129. **Claims against Directors.** — If liability of a director once accrues for any of the above described species of malfeasance in office, whether his acts have been the result of dishonesty, negligence, or incompetence, the claim of the bank against him becomes a part of the assets of the institution. An assignee,

[22] Abeles *v.* Cochran, 22 Kans. 405 (1879). See (*c*) Story on Agency, §§ 264 *a*, 265 *a*. (*a*) Odgen *v.* Raymond, 22 Conn. 384. When the directors of an insolvent bank receive a deposit, in violation of statute, their liability is in tort. Baxter *v.* Nash, 70 Minn. 20, 72 N. W. 799 (1897); Soloman *v.* Bates, 118 N. C. 311, 316, 24 S. E. 478 (1896). (*b*) Aspinwall *v.* Torrance, 1 Lans. (N. Y.) 381; Sandford *v.* McAuthur, 18 B. Mon. (Ky.) 411.

[23] Wallace *v.* Lincoln Savings Bank, 89 Tenn. 630, 655, 15 S. W. 448 (1890).

[24] Witters *v.* Sowles, 31 Fed. 1.

[25] Hicks *v.* Steel, 142 Mich. 292, 105 N. W. 767, 4 L. R. A. (N. S.) 279, n. (1905).

[26] Bank of Des Arc *v.* Moody, 110 Ark. 39, 161 S. W. 134 (1913).

receiver, commissioner, or other party whomsoever, who may come into possession of the corporate property for the purpose of collecting it and distributing it among the creditors and shareholders, is obliged to regard the rights of action against such delinquent directors as a part of the available assets. It is his duty to push the claims, to make what he can out of them, and to apply the proceeds together with the other funds of the corporation to the discharge of its indebtedness and the reimbursement of its creditors and shareholders. The suit may be instituted in the corporate name, provided it is stated that it is instituted by order of the receiver.[1] Neither a stockholder nor a creditor can sue the directors of an insolvent bank to make them personally liable for mismanagement. The receiver alone can maintain the action.[1a] But where a cause of action exists and the bank refuses to sue, the depositors may do so.[1b] The liability is at common law, and though a statute or charter may declare what acts of a director, and under what circumstances committed, shall render him liable, yet these enactments will not operate to alter the nature of the liability, once accrued, or to render it statutory. They must be construed as simply relating to evidence, and as declaring that testimony establishing the acts and circumstances described, shall suffice to fix the liability; which, however, after it has been thus fixed, will still retain its original and inherent common law character. For this same reason dexterous and subtle evasions of the language of the statute will not enable the directors to frustrate its intent, or to shun a responsibility which is fastened upon them by extrinsic principles of law, wholly outside the statute or the charter, and existing quite independently of either. Thus, if the statute declares that, in case an insolvent or embarrassed bank shall be "*compelled*" to make an assignment, then the assignee shall pursue his rights of action against the directors, and their liability shall be maintained upon proof of certain facts in their conduct, the directors cannot escape either the obvious purport of this legislation, or their common law liability, by making a voluntary assignment before they have been actually "compelled" to do so.[2] And under Revised Statutes of U. S. the right

[1] § 129. Bank of Niagara *v.* Johnson, 8 Wend. (N. Y.) 645.

[1a] Howe *v.* Barney, 45 Fed. 668; National Exchange Bank *v.* Peters, 44 Fed. 13; Bailey *v.* Mosher, 63 Fed. 488.

[1b] Savings Bank *v.* Caperton, 87 Ky. 306, 311, 8 S. W. 885 (1888).

[2] Gunkle's Appeal, 48 Pa. St. 13; Schley *v.* Dixon, 24 Ga. 273.

to recover from a director the damages sustained in consequence of excessive loans made by him is not affected by the fact that the comptroller has or has not procured a forfeiture of the bank's charter.[2a] An action by the receiver of a bank against a director for losses caused by negligent conduct survives, and does not abate by the director's death.[2b] But whatever liability may have been incurred by all or any of the members of a board of direction, it will not descend to their successors in office, who are blameless upon their own account. Neither will it pass to any third party to whom they have assigned corporate property, if he took it in good faith, without collusion, and for value.[3]

§ 130. **Liability of Directors to Third Parties.** — It has been said, that aside from statute [0] no bank officer is individually liable to a creditor or depositor for mismanagement, unless his action is malicious or fraudulent.[1] But in the case of savings banks, of course, the officers are liable to the depositors for lack of ordinary care, and in commercial banks the better opinion is, that, though the officers are liable only to the bank for ordinary negligence,[1a] they are liable to third parties for gross neglect.[1b] The burden for exoneration is not on the directors, and they cannot be charged for losses unless it is shown that such losses resulted from their negligence.[1c]

(*a*) The directors of a bank are trustees [1d] for depositors, and

[2a] Stephens *v.* Overstolz, 43 Fed. 771; Gerner *v.* Thompson, 74 Fed. 125; Cockrill *v.* Cooper, 86 Fed. 7 (1898).

[2b] O'Brien *v.* Blaut, 17 App. Div. (Hun, N. Y.) 288 (1897); Stephens *v.* Overstolz, 43 Fed. 465.

[3] Schley *v.* Dixon, *supra.*

[0] § 130. In Kansas a statute has imposed upon directors the duty of examining into the affairs of their banks with reasonable frequency and thoroughness, and failure thereof renders them liable to depositors in case of insolvency of the bank; and it is no defence to show that the insolvent condition of the bank was caused by the false, fraudulent and corrupt practices of the cashier, so concealed that they could not have been discovered upon examination. Forbes *v.* Mohr, 69 Kan. 342, 76 Pac. 827 (1904).

[1] Fusz *v.* Spaunhorst, 67 Mo. 257; Howe *v.* Barney, 45 Fed. 668. See Hart *v.* Hanson, 14 N. D. 570, 105 N. W. 942, 3 L. R. A. (N. S.) 438, n. (1905).

[1a] Williams *v.* McDonald, 42 N. J. Eq. 392, 7 Atl. 866 (1886).

[1b] Union National Bank *v.* Hill, 148 Mo. 380, 49 S. W. 1012 (1898); Deaderick *v.* Bank, 100 Tenn. 457, 45 S. W. 786 (1899); Elliott *v.* Farmers' Bank, 61 W. Va. 641, 57 S. E. 242 (1907).

[1c] Warner *v.* Penoyer, 91 Fed. 587 (1898).

[1d] The directors of a bank are not trustees of an express trust but of an implied or resulting trust and when sued for its breach may plead, as a

can be held for injuries resulting from gross negligence on their part in allowing the bank to be held out to the public as solvent, when it was in fact insolvent. Sheldon, C. J., and Craig, J., dissenting.[2]

Directors Liable to Depositors for Gross Negligence. For Ordinary Negligence, only Liable to Bank

"Ordinarily the character of the directory for integrity and business capacity increases the degree of confidence reposed in the corporation by the public. Were depositors, when intrusting to a bank their entire fortune, to be informed that the directors, upon whose honor and careful watchfulness they were relying, owed them no duty, were under no obligations to take at least reasonable precautions to guard their money from the itching fingers of dishonorable officials, they would certainly hesitate long before surrendering it upon such terms. There are many risks and uncertainties against which a prudent business man never expects the directors or managers of banks to insure him.

(*b*) "*He knows that for the usual hazards of business he must look to the bank alone, that for the ordinary negligence of directors they are responsible alone to their principal; but for such gross* negligence or incompetency as shows a reckless disregard of their duty to care for and protect the funds committed to their charge, we think they are directly responsible to the depositor."

The directors in this case were notified by the president, ten months before the failure, of his suspicions that Compton was stealing from the bank, when the slightest examination would

defense, the statute of limitations which begin to run upon the commission of the breach of duty. Winston *v.* Gordon, 115 Va. 899, 80 S. E. 756 (1914).

[2] Delano *v.* Case, 12 N. E. 676, 17 Brad. 531 (Ill., 1887); Foster *v.* Bank of Abingdon, 88 Fed. 604 (1898); Holmes *v.* McDonald, 226 Ill. 169, 80 N. E. 714 (1907); Lippitt *v.* Ashley, 89 Conn. 451, 94 Atl. 995 (1915).

See Hart *v.* Hanson, 14 N. D. 570, 105 N. W. 942, 3 L. R. A. (N. S.) 438, n. (1905), where the bank was kept open for at least a year after its insolvency. The court said: "The defendant cannot be held liable on the theory that the continuation of the bank in business after insolvency was a false representation that it was solvent. Whatever may have been the appellant's duty under such circumstances it was a duty which, in a legal sense, he owed only to the corporation. For his acts or omissions as a director he is answerable only as agent or trustee to his principal, not to third parties. As an individual he owed no legal duty to the public or to the bank's creditors different from that which every person owes to all others to refrain from infringing on their rights."

have exposed the true state of affairs and protected subsequent depositors. No examination whatever was made. Under such circumstances there was clearly another duty which the directors owed to the community. If they knew that the bank was insolvent, or if their suspicions were aroused, and they recklessly closed their eyes and made no effort to discover the truth, it was their duty not to receive the money of depositors ignorant of the true state of affairs. To do so when they had but a suspicion of the danger would be a great wrong, and, if with full knowledge, would now be a felony. If we are correct in these views, it follows that appellants owed a duty to appellee which they have not performed, in consequence of which he has been injured, and for which he ought to have a remedy; for it is a maxim of the common law, that a man specially injured by a breach of duty in another should have his remedy by action.[2]

(*c*) So in Kentucky, the directors were held liable for special deposits stolen and sold by the officers, since ordinary diligence on the part of the directors would have disclosed the wrongful sales.[3]

(*d*) And, in Massachusetts, if the directors, through inattention or otherwise, suffer the cashier to pursue and practise a certain line of conduct for a considerable period of time without objection, the bank will be bound by his acts within that line of conduct.[3a]

(*e*) The directors of an insolvent national bank cannot be held for failure to discover and prevent a series of discounts of improperly secured paper, indorsed by a wealthy director who was the largest stockholder in the bank.

The president of a bank wished to resign on account of health, but was persuaded to retain his office and take a trip abroad; while away, and without his fault, losses were sustained by the bank. In a suit by the receiver to charge the directors, held, that the president was not liable, nor a director who had sold his stock and orally resigned his office to the president before the losses.[4]

(*f*) Directors of a national bank cannot be held to a common law liability for inattention to duty in not preventing a hazardous loan, made without their connivance or knowledge. Nor can the

[3] United Society *v.* Underwood, 9 Bush (Ky.) 609; Miller *v.* Howard, 95 Tenn. 407, 411, 32 S. W. 305 (1895).

[3a] L'Herbette *v.* Pittsfield National Bank, 162 Mass. 137, 38 N. E. 368 (1894).

[4] Movius *v.* Lee, 30 Fed. 298 (1887).

officers of an insolvent national bank be held liable to creditors for losses on loans made by them in good faith, merely because such loans seem unwise and perilous when looked back upon.[5]

In Arkansas the directors are by statute liable for trusting the management of the bank to its president, if injury to creditors results, and good faith of directors is no defence.[5a]

Directors are liable for losses resulting from their fraud or negligence, and they may be sued by a creditor or stockholder without first having applied to the corporation to bring suit.[5b]

Savings Bank Managers

(*g*) Managers of a savings bank may be liable if they participate in or promote prohibited acts causing loss, or if they neglect to bestow due care, whereby their associates are not restrained, or are enabled to do those acts which prove disastrous to the institution.[6]

It is competent to consider the course of conduct when certain managers were present in order to decide if they are liable for similar conduct of their associates in their absence.

§ 131. **Personal Liability of one held out as a Director.** — The owners of a State bank for more than four years published an advertisement of the bank, containing the names of persons (A., B., etc.) as directors who had never accepted the office, or acted as directors, or done or said anything to lead creditors to believe that they were directors. The bank failed, and it was decided that the creditors could not hold such persons as directors.[1]

(*a*) Freeman, J., dissented, thinking A., B., etc. had estopped themselves by allowing an official notice by the bank of its organizing with them for directors. It was notice of a business organi-

[5] Witters *v.* Sowles, 31 Fed. 1 (1887).

[5a] Fletcher *v.* Eagle, 74 Ark. 585, 86 S. W. 810, 109 Am. St. Rep. 100 (1905).

[5b] Braswell *v.* Pamlico Banking Co., 159 N. C. 628, 75 S. E. 813 (1912). See Bailey *v.* O'Neal, 92 Ark. 327, 122 S. W. 503, 135 Am. St. Rep. 185 (1909).

[6] Dodd *v.* Wilkinson, 42 N. J. Eq. 647, 9 Atl. 685 (1887); Toledo Savings Bank *v.* Johnston, 94 Iowa 212, 62 N. W. 748 (1895).

[1] § 131. Hume *v.* Commercial Bank of Knoxville, 9 Lea (Tenn.) 728.

The investment committee are liable to the bank and its depositors for loss resulting from loans largely in excess of the limit imposed by statute of which they might have known by the exercise of due care. Greenfield Savings Bank *v.* Abercrombie, 211 Mass. 252, 87 N. E. 897, 1913B Ann. Cas. 420, n., 39 L. R. A. (N. S) 173, n.

zation, inviting public patronage on the basis of confidence in those parties, and when parties stand by and permit the public to be notified for years that they are managers of such an institution until it is insolvent, they should not escape the responsibility justly attaching to such a position announced to the world. They assented to the advertisement as fully as if they had authorized it.

Discussion

(*b*) There is an immense confusion in the cases upon this subject of the personal responsibility of one held out as being in a position of responsibility, resulting, I think, from the alternate or mingled application of two principles. To put a penalty on conduct likely to lead to unsound credit, and to hold A. responsible for loss resulting from unsound credit actually given by his fault, — that is, to hold that A. shall make good to B. and C. the credit A.'s conduct has led them really to give him, — are two very different matters. If the judge follows the first line of thought he will hold A., whether the plaintiff knew that A. had allowed himself to be held out or not.[2] If he acts on the second ground, the defendant will only be liable when the plaintiff knew that A. was so held out, or the holding out was under such circumstances of publicity as to satisfy the jury that the plaintiff knew of it, and believed A. to be really a partner or director, or in such other position as the holding out would indicate.[3]

It would seem that the only proper ground in a civil suit would be the second, for no person should recover for injury to others, but only to himself, and must show that the defendant's conduct has really caused him loss. The repression of conduct injurious to the public is a matter for the State, although until the State wakes up to the matter it may be very well for the judges to apply the just penalty in the best way they can; as giving to some innocent person a little more than his just due, or relieving one from the consequence of his own error of judgment in trusting a firm, is probably a less evil to the community than allowing conduct subversive of sound credit and good faith.

§ 132. **False Statements of the Condition of the Bank.** — It often happens that the officers of corporations put forth deceptive

[2] Young *v.* Axtell, 24 Black 242.

[3] Dickinson *v.* Valpy, 10 B. & C. 128; Carter *v.* Whalley, 1 B. & Ad. 11; Alderson *v.* Pope, 1 Camp. 404.

and fraudulent reports, and make false statements concerning its affairs, in order to keep up its good repute with the public, and to sustain or raise the price of shares by attracting purchasers. As our banking corporations are conducted at present under the National Banking Act, deception cannot be easily effected by such artifices. Indeed, misconduct of this kind seems always to have been rare in the banking institutions of our own country, and most of the cases are English. The bank in its corporate capacity can never be held to answer for any species of fraud or deception of this nature practised by any of its directors or other officers individually, though at the banking-house and in banking hours. No single director, neither any other official, has it within the scope of his customary authority to bind the bank by any representations whatsoever made concerning its condition or affairs. The bank does not hold them out as competent to give information of this character, and any person who relies on statements thus received puts his confidence in the individual from whom the statements proceed; and though he may have a good cause of action against him, it is against him as a private individual, and not as an officer [0] of the bank, and can by no means be against the bank itself. And especially is this so when the officer gives the information as an individual and not as an officer of the bank.[0a] And so the fact that a depositor in a bank lost money deposited therein in reliance upon the statement by its president that it was sound is not a defence when sued upon an overdraft in another bank whose president was the president of the first bank.[0b]

When Bank is Liable

(*a*) The corporation can only be held liable if it publishes corporate reports, as such, falsely and with criminal intent. Such would be a statement adopted at a general meeting of the directors and intentionally put forth to the public, or left to reach the community in the ordinary course of business.

[0] § 132. Wolfe *v.* Simmons, 75 Miss. 539, 23 So. 586 (1897); Tate *v.* Bates, 118 N. C. 287, 24 S. E. 482 (1896); Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742 (1888).

A recovery against a director of a national bank must rest exclusively upon the United States Statute and not upon common law principles. Taylor *v.* Thomas, 124 App. Div. 53 (1908), 105 N. Y. S. 454, aff'd in 195 N. Y. 590, 89 N. E. 1113.

[0a] Simons *v.* Cissna, 52 Wash. 115, 100 Pac. 200 (1909).

[0b] Earle *v.* Munce, 133 Fed. 1008 (1904).

Officers' Personal Liability

(*b*) Where the directors have been assisted in the preparation of their deceptive or fictitious statements by any subordinate officers, these officers will be under the same personal liability as the individual directors, though the directors alone have signed the document.[1] The tendency in England seems to be generally to hold the directors liable if possible, and statutory enactments come to the aid of this tendency with thorough provisions and stringent punishments.[1a] Thus directors and any officer in collusion with them are liable to indictment for conspiracy to defraud by the publication of false balance-sheets and the circulation of false reports as to the condition and solvency of the bank; or the issuing and offering for sale new stock, at a time when they know the bank to be insolvent.[2] So again they were held criminally responsible for representing the affairs of the company to be prosperous, and declaring large dividends, when in fact the bank was embarrassed.[3] Directors are liable for injuries to a person who relies upon a statement issued by them, which they did not know to be true, as well as when they knew it to be false.[3a]

[1] Cullen *v.* Thomson, 4 Macq. H. L. Cas. (Sc.) 431, 9 Jur. N. S. 85; *Ex parte* Frowd, 9 W. R. 328, 3 L .T. N. S. 843; *Re* Royal British Bank, *Ex parte* Nicol, 5 Jur. N. S. 205, 28 L. J. N. S. 257.

[1a] In Idaho if an officer knowingly publishes a false written report he is guilty of a felony, and those who concur in false reports are guilty of a misdemeanor. State *v.* Paulsen, 21 Idaho 686, 123 Pac. 588 (1912). See also People *v.* Britton, 134 App. Div. 275 (1909), 118 N. Y. S. 989.

[2] Regina *v.* Esdaile, 1 F. & F. 213; Grant on Bankers and Banking.

[3] Burnes *v.* Pennell, 2 H. L. C. 497; Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742 (1888).

[3a] Solomon *v.* Bates, 118 N. C. 287, 24 S. E. 482 (1896); Houston *v.* Thornton, 122 N. C. 365, 29 S. E. 827 (1898). These two cases are called "extremely harsh" in Mason *v.* Moore, 73 Ohio St. 275, 76 N. E. 932, 4 L. R. A.(N. S.) 597, n. (1906), which holds that if directors honestly attest a false report of cashier they are not liable in deceit; but that honesty of intention cannot excuse indifference or negligence. See also McDonald *v.* De Fremery, 168 Cal. 189, 142 Pac. 73 (1914).

If the directors knew, or in the exercise of ordinary diligence in the discharge of their duties would have known, that the statement was not true they are individually liable for injuries to one relying thereon in good faith. Smalley *v.* McGraw, 148 Mich. 384, 111 N. W. 1093 (1907).

The report required by statute is for the benefit of the public, and one contemplating the purchase of stock of the bank has a right to rely upon the published reports as a true statement, without further inquiry, in the absence of knowledge tending to show them unbelievable, and one is not chargeable with knowledge that he may have discovered but only with the natural inferences deducible from the knowledge he has. Smalley *v.* McGraw, *supra*.

In a New York case,[4] one count alleged that a falsehood concerning the amount of stock actually subscribed and paid in had been uttered by the defendant, as director, together with the other directors, in the articles of association, whereby the plaintiff had been induced to buy shares. The court said that it was difficult to understand how a director could be individually chargeable for false statements in the articles of association, which necessarily preceded in order of time the election of directors; or how such articles could have the character of a continuing false representation by every director who might subsequently come into the board, so as to give a right of action against him to every one thereafter purchasing stock. The second count alleged that the defendant falsely and fraudulently represented to the plaintiff that the shares were actually worth par or over, whereby the plaintiff was induced to purchase. In order to sustain this count it was necessary to make out a good cause of action against the defendant in his individual capacity. As director he could not be charged with knowledge of the value of the stock. But at any rate the pleading was fatally defective in failing to allege that the misrepresentations were made with the intent to deceive the plaintiff. The whole statement of the count might be true, and yet this intent might have been absent; and the allegation and proof of the intent are a *sine qua non* to a recovery. The principles laid down in this decision are unquestionably correct. Yet as the professional man studies the case he will be obliged to regret, either that it was so wofully misunderstood or mismanaged by the plaintiff's counsel, or that it was so clumsily reported. One or the other of these misfortunes has robbed it of much of its value as an authority.

The liability of directors of a national bank to a common law action of deceit for false and fraudulent representations made by them in the pretended performance of duties imposed upon them by the national banking law is not precluded by the liability imposed in that law for violation of its provisions.[5]

[4] Mabey *v.* Adams, 3 Bosw. (N. Y.) 346.

[5] Prescott *v.* Haughey, 65 Fed. 653; Mason *v.* Moore, 73 Ohio St. 275, 76 N. E. 932, 4 L. R. A. (N. S.) 597, n. (1906).

The liability of the directors is independent of the national banking act and is derived from the principles of the common law. Smalley *v.* McGraw, 148 Mich. 384, 111 N. W. 1093 (1907). But see opinion in the case on motion for a rehearing.

One injured by reliance on the false statements published by a direc-

If the action against the directors is for deceit, knowledge of the false statements [5a] and damage must be shown.[6]

§ 133. **Notice to the Board.** — It is a question of frequent occurrence and considerable moment, under what circumstances a bank will be affected with notice of a fact which has not been actually and formally notified to its assembled directorial board. It is not, of course, indispensable that a formal statement should be made to the board at its regular meeting. A discussion or open mention of the matter there, however introduced, is amply sufficient.[1] But where the information remains the private knowledge of a portion only of those present, it is important to know when the knowledge of this portion will, and when it will not, be considered to be the knowledge of the bank. Knowledge once

tor that the bank is solvent when in fact it is insolvent may maintain an action in his own name and for his own benefit, and the fact that the statements are not known to be false is no defence. Yates *v.* Jones National Bank, 74 Neb. 734, 105 N. W. 287 (1905). But Jones National Bank *v.* Yates, 93 Neb. 121, 139 S. W. 844 (1913), holds that the directors are not liable unless they personally knew of or personally participated in the acts of the officers of the bank. A director of a national bank is not liable for his own mistakes or blunders, or for the mistakes or blunders of his brother directors; neither is he liable for the fraudulent wrongs of the officers of the bank unless he has personal knowledge thereof or participated in such fraudulent acts. And the State courts cannot disregard the rule provided by U. S. Rev. Sts. § 5239, nor create another rule. Jones National Bank *v.* Yates, *supra*. And see Yates *v.* Jones National Bank, 206 U. S. 158, 51 L. ed. 1002, 27 Sup. Ct. 638 (1906), reversing 74 Neb. 734, *supra*, holding that U. S. Rev. St. § 5239 affords the exclusive rule by which to measure the rights to recover damages from directors in national banks, and their liability cannot be measured by a standard higher than that imposed by the Act and that they are not liable for deceit, at least in the absence of knowledge, actual or in effect, that the reports are false. But Thomas *v.* Taylor, 224 U. S. 73, 56 L. ed. 673, 32 Sup. Ct. 403 (1911), shows that where the requirements of deceit are identical with the requirements of the national banking act an action may be maintained for deceit, and that recklessness of a director in deliberately refusing to examine that which it is his duty to examine is, in effect, knowledge. And it is no defence that the statement of the condition of the bank was made under the order of the Comptroller of the Currency if the statement was false and knowingly made, nor is it a defence that the action was not based on the federal statute when the requirements of the pleadings and the requirement of the statute are identical.

[5a] Delvin *v.* Moore, 64 Or. 433, 130 Pac. 35 (1913).

[6] Brady *v.* Evans, 78 Fed. 558.

[1] § 133. Bank of Pittsburg *v.* Whitehead, 10 Watts (Pa.) 397. In this case it was noted as a *quære* whether publication in a newspaper subscribed for by the bank would operate as constructive notice to the bank. It is hardly probable that such a notion could be sustained; it is going much too far.

received by any board of directors is in law, however it may be in fact, retained by every subsequent board, and the bank will be affected by it without a repetition of the communication.[2]

What the directors ought to have known by proper diligence as to the general course of the bank's business, they are presumed to have known in a contest between the bank and third persons dealing with it in good faith.[3]

§ 134. **Notice to a Single Director.** — The question whether it is just to hold the bank bound by the knowledge of a single member of a composite agency unless he decides the vote or action of the body, is discussed above, § 112.

General Rule as Actually Adopted

The general rule actually adopted is as follows. If the director acquired it in his official capacity, or in the course of or in relation to any special matter or function of which he had charge as an agent of the bank, then he knows it as a director, and the law holds that the bank also knows it.[0] If he acquired it, however, solely as any other private individual might have acquired it, and not officially, or in connection with his discharge of the functions of his office, or if it did not relate to any matter in which he owed a peculiar duty to the bank, he does not know it as director, and the bank does not know it by implication from his knowledge,[0a] except when he afterward *acts for the bank* having such knowledge

[2] Mechanics' Bank of Alexandria *v.* Seton, 1 Pet. 299, 7 L. ed. 152; Fulton Bank *v.* New York & Sharon Canal Co., 4 Paige (N. Y.) 127.

[3] Martin *v.* Webb, 110 U. S. 7, 28 L. ed. 49, 3 Sup. Ct. 428; McDaniel *v.* Harvey, 51 Mo. App. 198; Roberts *v.* Washington National Bank, 11 Wash. 550, 40 Pac. 225 (1895); Ames *v.* Farmers' etc. Bank, 48 Wash. 328, 93 Pac. 530 (1908); Orme *v.* Baker, 74 Ohio St. 337, 78 N. E. 439, 113 Am. St. Rep. 968 (1906); Spongberg *v.* First National Bank, 18 Idaho 524, 110 Pac. 716, 1912A Ann. Cas. 95, n., 31 L. R. A. (N. S.) 736; Lowndes *v.* City National Bank, 82 Conn. 8, 72 Atl. 150, 22 L. R. A. (N. S.) 408 (1909); Franklin *v.* Caldwell, 123 Ky. 528, 96 S. W. 605 (1906).

[0] § 134. A majority of the directors or a superior officer vested with authority to condone wrongdoing, or to a faithless employee, must know of the default of its officer in order that the surety may be discharged on his official bond. Fidelity etc. Co. *v.* Courtney, 186 U. S. 342, 46 L. ed. 1193, 22 Sup. Ct. 833 (1902).

[0a] Notice privately given to a director of an incorporated institution, or which he acquires from rumor, or through channels open alike to all and which he does not communicate to his associates of the board will not bind the institution. Black *v.* First National Bank, 96 Md. 399, 54 Atl. 88 (1903); First Denton National Bank *v.* Kenny, 116 Md. 24, 63 Atl. 70, 1913B Ann. Cas. 1337, n.; Maryland Trust Co. *v.* National Mechanics' Bank, 102 Md. 629, 63 Atl. 70 (1906).

presumably still present in his mind at the time he acts in the matter to which it relates, and having no adverse interest to keep him from fulfilling his duty by communicating his information to the bank;[0b] or, if he has such adverse interest, then to hold the bank two facts must coexist; viz. the party C. in controversy with the bank, or the one on whose right he stands, must have been aware that the director possessed the knowledge, and not aware of the adverse interest.[1] § 136.

The knowledge of the single director must be actual, not merely constructive. § 135.

(*a*) Many cases have arisen wherein the interpretation of the courts has been called in, not to determine the rule, but to declare whether or not the circumstances bring the case within the one or the other division of the rule. The question is whether the law will endow the receiver of the knowledge with an official and directorial character, or only with his private and individual personality at the time when he came by the information in question. It is by no means easy to establish any definite test by which, as by a touchstone, all doubtful cases can be at once and infallibly solved, and arrayed upon the one or the other horn of the dilemma. Nothing better can be done than to give brief abstracts of ten or twelve from among the cited cases, selected with a view to showing, as well as may be, the tendency of the courts in such causes.

[0b] Knowledge by the president of a corporation of a lien on machinery bought by it is not notice to the bank loaning money to such corporation though the president of the corporation who procured the loan was a director and a member of the loan committee of the bank. Wardlow *v.* Troy Oil Co., 74 S. C. 368, 54 S. E. 658, 114 Am. St. Rep. 1004 (1906).

[1] Custer *v.* Tompkins County Bank, 9 Barr (Pa.) 27; National Bank *v.* Norton, 1 Hill (N. Y.) 572 (a leading authority); Bank of United States *v.* Davis, 2 *id.*, 451; Fulton Bank *v.* Benedict, 1 Hall (N. Y.) 480; Fulton Bank *v.* New York & Sharon Canal Co., 4 Paige (N. Y.) 127; Washington Bank *v.* Lewis, 22 Pick. (Mass.) 24; Loomis *v.* Eagle Bank of Rochester, Disney (Ohio) 285; Bank of Pittsburg *v.* Whitehead, 10 Watts (Pa.) 397; Louisiana State Bank *v.* Senecal, 13 La. 525; Powles *v.* Page, 3 C. B. 16, 15 L. J. C. P. 217; *In re* Carew, 31 Beav. 39. See The Distillery Spirits, 11 Wall. 356, 20 L. ed. 167; National Bank *v.* Cushman, 121 Mass. 490; Fairfield Savings Bank *v.* Chase, 72 Me. 226; Anketel *v.* Converse, 17 Ohio St. 11; Hart *v.* The F. & M. Bank, 33 Vt. 252; Blumenthal *v.* Brainard, 38 Vt. 410; Hayward *v.* National Ins. Co., 52 Mo. 181; Dresser *v.* Norwood, 17 C. B. n. s. 466; Home Sav. etc. Bank *v.* Pooria Trotting Society, 206 Ill. 9, 69 N. E. 17, 99 Am. St. Rep. 132 (1903). But Pennsylvania holds notice to an agent twenty-four hours before the agency no more notice to the principal than if it came twenty-four hours after the agency ceased. Houseman *v.* Girard Mut. Bldg. and Loan Asso., 81 Pa. St. 256.

When Director Acts, Bank Held

(*b*) In Bank of the United States *v.* Davis, a bill of exchange was forwarded to one who was a director in the bank, with the request that he would procure a discount upon it. He did so; but at the meeting which made the loan, he was present and joined in all the proceedings, and there falsely alleged that the discount was for his own benefit, and dishonestly received the money. It was held that the bank was affected with knowledge of the fraud, and could not recover the amount of the bill from the defrauded party. The court said that it was not true that the director was not acting at the time on the behalf of the bank. He was present, consulting, advising, doubtless recommending the loan upon this very paper, all in his capacity as director, and it is fair to suppose that his influence as a director procured this discount. It is urged that he was only one of five directors engaged in the transaction. But the bank, having employed several agents to transact jointly a particular business, is equally responsible for the conduct of each and of all. The duty of any one of them to communicate his knowledge is as obligatory as if he were a sole agent.[2] It will be seen from the language of this decision how inextricably the matter of notice is intertwined with the principle of holding the bank liable for the default of its agent committed within the scope of his duty. Indeed, the rule may be expressed in the language of the latter principle as correctly as in any other form, — thus: Whatever knowledge a director acquires *within the scope of his official employment*, he is bound to communicate to his co-directors, that is to say, to the bank itself. If he neglects to do so, the bank is liable for the neglect of its agent to perform the duty of his agency.[2a] By either road the same conclusion is arrived at, which is the liability of the bank to the same extent as if it had known what its director knew and what he ought to have communicated. It may be said that it is chargeable with his knowledge, received within the scope of his agency and employment; or it may be said that it is chargeable with the result of his neglect to perform the duty of communication imposed upon him by his agency and employment. Practically, it matters little which course is chosen, or whether, as in the foregoing case, an effort is made to combine both.

[2] 2 Hill (N. Y.) 451.

[2a] Twenty-sixth Ward Bank *v.* Stearns, 148 N. Y. 515, 42 N. E. 1050.

Director Acted

In North River Bank *v.* Aymar the director was present and did act in his official character, and in prosecution of his directorial agency. It was there held that, if the note of a firm were discounted by a bank, one of the directors who was present and acted concerning the discount being also a member of the firm, and having knowledge of facts tending to invalidate the note, the bank would be affected with his knowledge and chargeable with notice.[3]

In order to bind the bank the facts known by the director must be material to the transaction.[4]

§ 135. **The Knowledge of the Director must be Actual.** — A. was director in a bank, and a member of the discount committee; he was also president of a corporation, one of whose agents had such knowledge of certain infirmities in a note discounted by the bank as affected this corporation with knowledge. Held, that the bank was not affected by this merely constructive knowledge of its director.[1]

§ 136. **If the Director having Notice does not act in the Matter, or is known by the Third Party to be adverse to the Bank's Interest,** the information he has is not imputed to the bank.

In Terrell *v.* The Branch Bank of Mobile,[1] the opinion, though not emanating from a leading bench, is eminently sound and keen; and the contrast with Bank *v.* Davis is well worth examination. A. signed a promissory note in blank and gave it to B., a director in the defendant bank, with directions to fill it up with the sum of "five hundred dollars", and to use it in renewal of A.'s note for the same amount already held by the bank. B. filled it up with a larger sum, and had it discounted for his own benefit. He

[3] North River Bank *v.* Aymar, 3 Hill (N. Y.) 262.

[4] Caseo National Bank *v.* Clark, 139 N. Y. 307, 34 N. E. 908; Merchants' National Bank *v.* Clark, 139 N. Y. 314, 34 N. E. 910.

[1] § 135. Mann *v.* Second National Bank of Springfield, 34 Kan. 746. To the same effect see Iowa National Bank *v.* Sherman, 17 S. D. 396, 97 N. W. 12, 106 Am. St. Rep. 778 (1903), where the president of the bank was a stockholder in the corporation and the cashier of the bank was a stockholder and secretary of the corporation. But see the same case reported in 19 S. D. 238, 103 N. W. 19, 117 Am. St. Rep. 941 (1905), holding that the case should be submitted to the jury on the good faith of the transaction.

If three directors do an authorized act and purposely withhold all information thereof from the other fifteen directors the bank is not bound. Traders' etc. Bank *v.* Black, 108 Va. 59, 60 S. E. 743 (1908).

[1] § 136. 12 Ala. 502.

was present at the meeting of the board which made the discount, but of course he did not disclose the truth. In this case his knowledge was not held to affect the bank, and A. was obliged to pay upon the note the amount fraudulently filled in. The two cases seem strikingly alike in their facts, yet the opposite decisions in them respectively seem equally satisfactory. The point at once of reconcilement and of difference lies in this fact. The fraud in Bank *v.* Davis was committed by the director, or at least the first steps in it were taken by him, when he was acting officially and on behalf of the bank, and within the scope of his agency for the bank; his undisclosed knowledge of the truth therefore affected the bank, for he possessed his knowledge officially; the fraud in the second case was committed by the director as an individual, when he was acting as agent for A. in a matter in which A. had specially commissioned and intrusted him to act; his knowledge of the truth, therefore, was his private knowledge, and not the knowledge of the bank; for he did not possess it officially. In each case, the principal in whose business the director was agent for the time being, and within the scope of his agency for whom he committed the fraud and possessed a knowledge of the truth which he did not disclose, was obliged to suffer the penalty of his breach of his trust, and to make good his fraud.

Director Adverse to Bank

(*a*) In Loomis *v.* Eagle Bank of Rochester,[2] a bank director was payee of a note, a part of which the makers claimed the right to recoup by reason of an alleged breach of contract between themselves and the payee. The director transferred and indorsed over the note to the bank for value and in due course of business, but without informing them of the claim of the makers. It was held that the claim could not be sustained as against the bank. The knowledge of him who was at once payee and director was not the knowledge of the bank. He did not come by it or possess it officially. The court remarked that to insist that the private knowledge of any director should bind the bank would work indefinite mischief in business.

In Washington Bank *v.* Lewis,[3] a director procured the discount

[2] Disney (Ohio) 285. See Lilly *v.* Hamilton Bank, 178 Fed. 53 (1909); American National Bank *v.* Ritz, 70 W. Va. 409, 74 S. E. 679, 10 L. R. A. (N.S.) 156 (1912).

[3] 22 Pick. (Mass.) 24.

of a note which was afterwards disputed for fraud. The defence was not considered good. But this case is to be distinguished from the case of Bank of the United States *v.* Davis; for whereas in that case the director had, at least presumably, acted as a director in procuring the loan, in the present case the court distinctly state that it was because he did *not* act officially in the making of the loan, but simply applied for and obtained it as any other person, wholly an outsider, would and must have done, that the defence cannot be sustained.

Director Did not Act. Bank not Bound

(*b*) The two cases differ from each other in precisely the vital point; — in the former, the director had knowledge, within the scope of his agency, which, since he acted in the prosecution of his agency, he was bound to communicate, and which was therefore in law the knowledge of the bank; in the latter case the director, having, in fact or presumably, the same species of knowledge, explicitly refrained and declined to exercise his official agency in the matter, but dealt, as he had a right to do, with the other directors wholly in the character of an outside negotiator and contractor; since he was not acting in his agency, it followed, unavoidably, that he owed no duty to the bank, and that his knowledge was private, not corporate, in its character.

Absent Director's Knowledge

Where, in absence of a director by whom a note has been offered for discount, the bank accepts it, and accepts as collateral a note payable to him and indorsed to it as collateral, the bank's rights are not affected by his knowledge of illegality in the inception of the note accepted as security.[4]

The Party Dealing with the Cashier Knew he was Acting Adversely

(*c*) A cashier wishing to procure of the bank money to buy railroad stock, agreed with H., a third party, who knew that a rule of the bank forbade its officers to become its debtors, to buy two hundred shares of stock, the cashier to advance to H. money of the bank to pay therefor, H. to give his note to the bank for the money, and deposit the stock as collateral security. This was

[4] Third National Bank of St. Louis *v.* Harrison, 3 McCrary 316 (1882).

done, and the cashier assumed payment of the note, the stock being his. The bank had no notice of this arrangement except the cashier's knowledge. H. afterwards advised the cashier to sell the stock, and the cashier agreed that H. might use his own discretion therein. H. thereupon effected a sale, but the cashier refused to confirm it or deliver the stock.

In an action by the bank on H.'s note, the court held that the bank was not concluded by the cashier's knowledge. He acted adversely to the bank, and the third party in the dealing knew it.[5]

Director Acting Adversely, Bank not Bound by his Knowledge

(*d*) The law has been laid down in Massachusetts to the same effect, where a director borrowed money from his own bank. It seems that in such a transaction the director is to be regarded as acting in his independent and individual capacity, and not on behalf or for the interest of the bank, for he is in fact the other party to the contract, and naturally must be expected to look out for himself, and to assume to a certain extent the character of an adversary in the bargain.[5a] A. shipped sugar to B., with authority to B. to sell it in due course of business for a long while conducted between them. The bill of lading stated the shipment to be made by order of B., and that the sugar was deliverable to his order, with no words indicative of agency on his part. B. indorsed this document, and pledged it as collateral security for a loan which he negotiated with a bank of which he was a director; and he himself was present at the meeting of directors which passed upon the loan. It was held, in action by A. against the bank, that the bank could not be charged with the knowledge of the director that his act was fraudulent.[6]

Director did not Act, and the Bank not Bound

(*e*) In Shaw *v.* Clark a note was discounted by a bank. It was claimed that one of the directors, E., knew the note was upon

[5] Savannah Bank & Trust Co. *v.* Hartridge, 73 Ga. 223 (1884).

[5a] Lilly *v.* Hamilton Bank, 178 Fed. 53 (1909).

[6] Innerarity *v.* Merchants' National Bank, 139 Mass. 332, 1 N. E. 282. Notice to one of the directors of a matter affecting the interest of the bank which it is the interest of such director to conceal is not notice to the bank. First National Bank *v.* Lowther-Kaufman Oil Co., 66 W. Va. 505, 66 S. E. 713, 28 L. R. A. (N. S.) 511, n. (1910); City Bank of Wheeling *v.* Bryan, 72 W. Va. 29, 78 S. E. 400 (1913).

a gaming consideration. E. recommended the discount, but did not "*act*" nor "control the discretion" of the board in making the discount. The court held that the bank was not charged with his knowledge.[7]

Director Did not Act

(*f*) A note was obtained from the maker by fraud. P., a director of the bank discounting the note, had notice of the fraud, but did not communicate his knowledge to any other bank officers, *neither did he take part in the discounting*, wherefore his information did not affect the bank.[8]

Rule

If a director is not present and *acting* at the discount of a note, his knowledge of illegality or want of consideration is not notice to the bank; but if he acts with the board the bank is held by his knowledge.[9]

N. Y. Director Did not Act

(*g*) The knowledge of usurious taint in negotiable paper acquired by a director, but not while acting for the bank, is not thereby the knowledge of the bank; and as said director did not, while having such notice, do any act for the bank in respect to such paper, the bank is in no way affected by his information.[10]

The same distinction is taken in a case where one of the directors who did *not act at the discounting* had notice of irregularities attaching to the note. The bank was not affected with notice.[11]

[7] Shaw *v.* Clark, 49 Mich. 384 (1882); National Security Bank *v.* Cushman, 121 Mass. 490.

[8] First National Bank of Hightstown *v.* Christopher, 40 N. J. L. 435 (1878); McCalmont *v.* Lanning, 154 Fed. 353 (1907).

Where a director usurps the functions of the board of directors and discounts a note without its knowledge or authority, the board is not chargeable with notice. Lanning *v.* Johnson, 75 N. J. L. 259, 69 Atl. 490 (1908).

[9] North River Bank *v.* Aymar, 3 Hill (N. Y.) 262; National Security Bank *v.* Cushman, 121 Mass. 490; Farmers' Bank *v.* Payne, 25 Conn. 444; The President *v.* Cornen, 37 N. Y. 320; Commercial Bank *v.* Cunningham, 24 Pick. (Mass.) 270; Washington Bank *v.* Lewis, 22 Pick. (Mass.) 24; Housatonic Bank *v.* Martin, 1 Met. (Mass.) 294; Mayor of New York *v.* Tenth National Bank, 111 N. Y. 446, 18 N. E. 618 (1888). But see Lanning *v.* Johnson, 75 N. J. L. 259, 69 Atl. 490 (1908).

[10] Atlantic State Bank *v.* Savery, 82 N. Y. 291.

[11] National Park Bank *v.* German Mutual W. & Security Co., 53 N. Y. Superior Ct. 367. See Lilly *v.* Hamilton Bank, 178 Fed. 53 (1909).

§ 137. **Director chargeable with Knowledge as against himself.** — The converse of the doctrine just discussed is much more simple. Whatever knowledge a director has or ought to have officially, he has, or will be conclusively presumed at law to have, as a private individual.[0] In any transactions with the bank, either on his own separate account or where others are so far jointly interested with him that his knowledge is their knowledge, he and his joint contractors will be affected by this knowledge which he has, or which he ought, if he had duly performed his official duties, to have acquired.[1] Thus, a director is affected with notice of the condition [1a] and transactions [1b] of the bank, of its legal rights, and of the action of its directorial board on any subject. If the bank is insolvent, or if it offers him for purchase notes which could only be legally sold by authority of a directorial vote which has never been given, he is affected with knowledge of the insolvency, and of the illegality of the notes.[1c] He cannot collect upon them from the bank, on the ground of presumed regularity, as a *bona fide* outside purchaser of them, without notice and for value, could do.[2] But in a suit between a bank and its directors, a director is not presumed to have knowledge of all that is shown on the bank books.[2a]

If a director of a bank is surety on a note, or if a director is a partner in a firm which is surety on a note, held by the bank, the surety will be affected with knowledge of the payment or non-payment of the note without regard to any statement made by the cashier. A director is chargeable with this amount of knowledge of the affairs of the bank, whether in fact he has it or not, and can-

[0] § 137. McCarthy *v.* Kepreta, 24 N. D. 395, 139 N. W. 992, 1915A Ann. Cas. 834, n.

[1] Lyman *v.* United States Bank, 12 How. 225, 13 L. ed. 965, 1 Blatch. (C. C.) 297; McCarthy *v.* Kepreta, 24 N. D. 395, 139 N. W. 992, 1915A Ann. Cas. 834, n.; Rattelmiller *v.* Stone, 28 Wash. 104, 68 Pac. 168 (1902).

[1a] Tate *v.* Bates, 118 N. C. 287, 24 S. E. 482 (1896); Hauser *v.* Tate, 85 N. C. 81.

[1b] McCarthy *v.* Kepreta, 24 N. D. 395, 139 N. W. 992, 1915A Ann. Cas. 834, n.

[1c] He is also affected with knowledge that a note sold him by the bank acting through its cashier was taken by the bank without consideration. McCarthy *v.* Kepreta, 24 N. D. 395, 139 N. W. 992, 1915A Ann. Cas. 834, n.

[2] Gillet *v.* Phillips, 3 Kern. (N. Y.) 114; McCarthy *v.* Kepreta, 24 N. D. 395, 139 N. W. 992, 1915A Ann. Cas. 834, n.

[2a] Wallace *v.* Lincoln Savings Bank, 89 Tenn. 630, 15 S. W. 448 (1890).

not escape any responsibility which such knowledge properly entails.[3]

In the discussion of this topic a brief abstract of the case of Curtis *v.* Leavitt should not be omitted.[4] Bank directors authorized the issue of bonds to certain trustees for sale. The officers whose duty it was to make the issue assigned the bonds to persons other than those named as trustees, and also to an amount in excess of that authorized. Their action in the latter particular, however, was subsequently ratified by the corporation. One of the persons acting as a trustee was also a director. The court declared the assignment valid for the benefit of *bona fide* purchasers of the bonds for value and without notice, and that the knowledge possessed by him who combined the positions of director and trustee, that the assignment was in fact without due authority, did not make the purchasers of bonds under the trust chargeable with a like knowledge. It is clear from the language of the court, that, if the director and trustee had, in his latter capacity, been the *real* party in interest, instead of only a trustee nominally representing entirely innocent third parties, the decision would have been to the contrary effect. So that this case at once proves the general doctrine, and furnishes a valuable specimen of exception to it.

It is not a conclusive presumption that a director knows the circumstances under which a bank takes a note. B., a director, bought a note, not knowing that the payee had delivered it to the bank without indorsement as collateral security. In a suit against the maker, it was held that B.'s directorship did not affect him with notice.[5]

§ 138. **Qualifications of Directors.**[6] — A method frequently resorted to for securing the fidelity of directors in the exercise of

[3] Merchants' Bank *v.* Rudolf, 5 Neb. 527; McCarthy *v.* Kepreta, 24 N. D. 395, 139 N. W. 992, 1915A Ann. Cas. 834, n.

[4] 15 N. Y. 9.

[5] Baldwin *v.* Proctor, 82 Ind. 370. But see McCarthy *v.* Kepreta, 24 N. D. 395, 139 N. W. 992, 1915A Ann. Cas. 834, n., where the question is fully discussed and which holds that the president of a bank must be presumed to have received the knowledge possessed by the cashier that a note taken by him for the bank was without consideration. The knowledge is not only constructive but is conclusively presumed to be actual and estops the president who has purchased the note from the bank from claiming to be a holder in due course to the same extent that it would have operated upon the cashier individually who negotiated the loan, and the president is also chargeable with knowledge that the note was given for an excessive loan and so with the bank's violation of law forbidding such loans, and his neglect of duty by failing to participate in the active management of the bank is immaterial.

[6] § 138. See Fed. Res. Act, Sec. 4, Part II. § 106.

their duties is to require them to own in their own right and unincumbered a certain number of the shares of the corporation. Imperfect as this must be as a check upon men of large property, it is perhaps the best available plan. It has been adopted in our National Banking Act, which declares (sect. 9) that each director shall own at least ten shares of the corporate stock. This regulation, however, simply prescribes the requisite qualification for election to the office. If a person not thus qualified is elected, and seeks to enter upon the office without qualifying by the purchase of the requisite number of shares, he may be ousted by legal process, but his acting as a director will not make him in any manner liable for this number of shares. Neither can he be regarded either at law or in equity, or for any purposes, as the constructive owner of them. His entering upon the enjoyment of the office does not in any case estop him from alleging his non-ownership of the requisite number of shares to qualify him for the position.[1] The cases cited show that, in England, where a person who had subscribed for twenty-five shares was chosen a director, and acted as such, though the ownership of fifty shares was required by law in order to qualify him for the position, yet he could be held liable as a contributor only for the price of the twenty-five shares, though the company was insolvent and the creditors were sufferers. A stronger or more conclusive case than this one could not be desired.[2]

§ 139. **Continuance in Office.** — It is a common proviso that directors, once chosen, shall remain in office until a choice of successors has been made. It is a useful and convenient precaution, by which accidental or unavoidable intervals are bridged over without an interregnum, than which nothing could be more injurious to the interests of the bank. Though the original term of office be limited to one year, yet it may be indefinitely prolonged under this provision. The irregularity in failing to make a choice in due season may subject the corporation to statutory penalties; but this is a different matter, and does not touch the tenure of office of the old board. The rule and its working are usually simple enough, and we have found only one case where litigation has arisen under it. Here choice of a board of directors was made, but the company was hopelessly insolvent. It was not formally

[1] *Ex parte* Marquis of Abercorn, 31 L. J. Ch. 828; *Ex parte* Roney, 33 *id.*, 733.

[2] Richards *v.* Attleborough National Bank, 148 Mass. 187, 19 N. E. 353 (1889); Crease *v.* Babcock, 23 Pick. (Mass.) 334; Thornton *v.* Marginal Freight Railway, 123 Mass. 32.

dissolved, but no business whatsoever was undertaken by it for sixteen years thereafter. It was held that the last chosen directors could not be regarded as continuing in office throughout this period on the ground that no choice of successors had relieved them. Their neglect, not objected to, to perform any official duty in so long a time, was construed as equivalent to their abandonment or resignation of their positions.[1]

The provision in the United States Revised Statutes, § 5145, that, when elected, a director shall hold office for one year and until his successor is elected, does not preclude him from resigning within the year.[1a]

The mere fact that the bank is insolvent or bankrupt does not vacate the office of director.[2]

§ 140. **Pay of Directors for Services.**[0] — Ordinarily the position of director, whether in a bank or any other corporation, is not one entitling the incumbent to demand compensation for his services. Usage is so uniformly to the effect that the services are rendered gratuitously, that an especial contract or vote could alone enable a director to demand pay as a legal right. Nor could even a formal vote confer upon him this right, if it were not passed until after the rendition of the services. For it would then become invalid on the ground of want of consideration.[1] So it has been held that a director, who was receiving no compensation, could not recover from the bank a reward offered by it for the recovery of money stolen and the detection of the thief. For it was only a part of the legal duty imposed by his office to give all the information upon these points which he might succeed in acquiring. But the principle applies only to the services performed by directors in the execution of their directorial functions. For services rendered prior to their becoming directors they may properly be paid. So also for services in any special duty or agency wholly outside of the ordinary duty or agency of a director, they are entitled to pay upon the principle of *quantum meruit*.[2] If a peculiar and

[1] § 139. Bartholomew *v.* Bentley, 1 Ohio St. 37.

[1a] Briggs *v.* Spaulding, 141 U. S. 133, 35 L. ed. 662, 11 Sup. Ct. 924 (1889).

[2] Holland *v.* Heyman, 60 Ga. 174 (1878).

[0] § 140. See Fed. Res. Act, Sec. 4, Part II. § 109.

[1] Hall. *v.* Vermont & M. R. R. Co., 28 Vt. 401; Pierson *v.* Thompson, 1 Edw. Ch. (N. Y.) 212; Loan Association *v.* Stonemetz, 29 Pa. St. 534; Godbold *v.* Branch Bank, 11 Ala. 191; Dunston *v.* Imperial Gas Co., 3 B. & Ad. 125.

[2] Stacy *v.* State Bank, 4 Scamm. (Ill.) 91.

especial task is undertaken by a director at the request of the board, which he is under no obligation to undertake simply because he is a director, and which he could not reasonably be expected or required to undertake gratuitously after the fashion of his ordinary directorial functions, neither justice nor any judicial decisions oppose his receiving or requiring just compensation for the labor.[3] But in Alabama, where pay was allowed to directors of the State Bank, and the amount was fixed by law, it was declared that no additional pay could be allowed for extra services rendered during incumbency in the office.[4] The fact that regular pay was given takes this case out of the operation of the general rule. It was probably considered that the pay was intended to buy all such services as the directors should undertake, or be able or called upon to render, whether strictly within their ordinary duties or not. If the duty was unusual, so also was the receipt of any salary at least equally unusual.

Misconduct in a Transaction Forfeits Pay for Service in it

(*a*) If the directors are guilty of misconduct they forfeit all right to compensation. As against the holders of the bank's notes, and other creditors of the bank, the trustees are entitled to no compensation; as against the stockholders, whose wishes they had carried out, a different rule might apply, did not the principle of public policy intervene, denying compensation to a trustee who has shown bad faith toward the public.[5]

Where bank officials omit to charge and draw their salaries in order to make a better showing in the published reports, they are not estopped, as against the stockholders, from claiming their salaries upon the failure of the bank.[6]

§ 141. **Records.** — Records of the proceedings of the board of directors are good at law, although not taken at the time of the meeting. They may be made at any time subsequently, and relate back.[1]

[3] Branch Bank *v.* Collins, 7 Ala. 95; Chandler *v.* Monmouth Bank, 1 Green (N. J.) 255.

[4] Branch Bank *v.* Collins, 7 Ala. 95; Branch Bank *v.* Scott, *id.*, 107.

[5] Moses *v.* Ocoll Bank, 1 Lea (Tenn.) 398.

[6] Wheeler *v.* Aiken Co. Loan and Savings Bank, 75 Fed. 781 (1896).

[1] § 141. Commercial Bank *v.* Bonner, 13 Sm. & M. (Miss.) 649.

CHAPTER X

THE PRESIDENT

AUTHORITY. §§ 98, 114, 151.

§ 143. Inherent, confined to charge of bank's litigation.

(*d*) May enter remittitur for sufficient consideration.

(*e*) May receive deposits.

(*f*) May offer reward in certain cases.

(*g*) May assign a judgment.

(*h*) May take from debtor property incumbered by other debts.

(*i*) May bind the bank by his fraud in certain cases.

§ 144. (*f*) May give a receipt for securities deposited.
May certify checks. §§ 155 *d*, 413.

(*g*) May agree on a place of payment other than that named in a note.

(*a*) And may bind the bank in other ways, where the usage of banks and routine of business, or the custom of the particular bank, give him implied authority, or where he has authority expressly by the charter or vote of directors, or where he has publicly done a series of acts of a certain character without objection from the bank, or where his act has been ratified by the bank, as by long acquiescence.

§ 145. (*c*) For example, the president may, by custom, have power to take a debt due from the bank out of the statute.

DUTY. §§ 114, 125, 151.

§ 143. To preside at board meetings, and give careful supervision to the affairs of the bank.

NO POWER INHERENT. §§ 125, 127, 671.

§ 144. (*b*) To draw checks against the bank's funds.

(*j*) Or to indorse negotiable paper belonging to the bank.

(*b*) Or to control its finances.

(*b*) Or to settle with creditors.

(*b*) Or to dispose of or control the bank's property any more than any other director.

(*i*) Or to certify his own check.

(*c*, *h*) Or to release a claim or stay execution, though by long acquiescence in such act the bank is bound.

(*d*) Or to contract for the bank, though he may bind the bank by express or implied authority. See above (*a*), and Chap. VIII.

(*k*) Cases in which a narrower doctrine as to the president's contract power was held.
(*l*) Statutory authority.
(*m*, *n*) Authority given to president and cashier construed strictly.

§ 145. Representations and Admissions. §§ 42 *c*. 2, 103, 124, 167, 168, 203.
(*a*) Made within the scope of his agency (*i.e.* while transacting business for which he has authority, either express or implied) bind the bank.
(*b*) No inherent authority to release debt by admission.
(*d*) Nor to charge the bank with a debt.
(*c*) By usage, his acknowledgment at the bank or away from it may take a debt out of the statute.
(*e*, *g*) Not made as agent for the bank, in its business do not affect the bank.
(*f*) Representations to be construed strictly.

§ 146. Knowledge of the President. § 9, n. 9, §§ 104, 133, 166.
(*a*) His knowledge of an indorser's address is the bank's knowledge, and though he may be accidentally absent, the bank is not excused for failure to notify.
(*b*) Notice of suit is properly served on president, though away from bank.
(*c*) President's knowledge that a payment to bank is in fraud of the bankruptcy laws is imputed to the bank.
(*d*, *e*, *k*, *l*) President's knowledge of his own frauds not attributable to bank.
(*g*) President's knowledge that note is for accommodation binds the bank.
(*h*) Notice to the president that a note was procured by fraud does not bind the bank if made to the president in an unofficial capacity.
(*i*) Otherwise, if made to him in his official capacity.

§ 147. Liability of the President to the Bank for Breach of Trust. §§ 79, 128, 129, 717 *c*; II. §§ 53, 253.
(*a*) Passing bank's money to an irresponsible person.
(*b*) Selling property without authority.
(*c*) Statute of Limitations only begins to run against the bank from the time it discovers the fraud.

Liability to Third Parties.
(*d*) Not liable unless the parties acted upon his false representations.
(*e*) Approving false report.
(*f*) Constructive knowledge of president a question for the jury.

§ 148. Liability of One held out as President. § 130.
§ 148A. Liability for Acts of Other Officers.
§ 149. Personal Undertakings for the Benefit of the Corporation.
§ 150. Pay of the President.
§ 150A. Power to tax President.
State cannot tax president of a national bank.

§ 143. **President's Authority Virtute Officii.** — The president of the bank is usually, perhaps universally, a member of the board

of directors, and is customarily chosen by the board from their own number. Sections 8 and 9 of our National Banking Act prescribe this method for all banks organized under it. It is the duty of the president to preside at meetings of the board of directors. The amount and nature of the duties imposed upon him may vary in different associations according to the usages or the by-laws of each. But ordinarily *the position is one of dignity, and of an indefinite general responsibility, rather than of any accurately known power.* The president is usually expected to exercise a more constant, immediate, and personal supervision over the daily affairs of the bank than is required from any other director.[0]

Inherent Authority Small

(*a*) Usage or directorial votes may confer upon him special functions, and may extend his authority to correspond with the increase of active duties.[0a] But the authority inherent in the office itself is very small ;[0b] indeed, it is very difficult to say precisely how or wherein it is really much in excess of that which can be exercised by any other single director. Practically this legal prin-

[0] § 143. The duty of the president is to preside, and his other duties may vary according to usage or by law, and the fact that the cashier is allowed to retain physical control over securities is not necessarily evidence of negligence. The president is to be regarded as a trustee and bound to exercise care and prudence in his office in the same degree that men of common prudence ordinarily show in their own affairs. Davenport *v.* Prentice, 126 App. Div. 451 (1908), 110 N. Y. S. 1056.

In the District of Columbia the president of a bank is its chief representative and entitled to act as its agent in the transaction of its business. Russell *v.* Washington Savings Bank, 23 App. Cas. (D. C.) 398 (1904).

When the president is substantially paid for his supervision he must use a higher degree of care than when he is a mere figurehead. First State Bank *v.* Morton, 146 Ky. 287, 142 S. W. 694 (1912); *Ex parte* Rickey, 31 Nev. 82, 100 Pac. 134, 135 Am. St. Rep. 651 (1909).

[0a] The president may be authorized by the directors to do anything within the authority of the bank's charter. Boyd's Ex'r. *v.* First National Bank, 128 Ky. 468, 108 S. W. 360 (1908); *Ex parte* Rickey, *supra; Ex parte* Smith, 33 Nev. 466, 111 Pac. 930 (1913).

[0b] The president has no authority other than what is expressly granted by the charter, by-laws etc. Montgomery Bank *v.* Walker, 181 Ala. 368, 61 So. 951 (1913). He has only inherent power to preside at meetings and attend to the bank's litigation. Commercial National Bank *v.* First National Bank, 97 Tex. 536, 80 S. W. 601 (1904); Griffin *v.* Erskine, 131 Iowa 444, 109 N. W. 13 (1906). So neither he nor a director is legally authorized to close the bank or to prevent the receipt of deposit by the bank. *Ex parte* Smith, *supra.* But see Bartlett's Estate Co. *v.* Fraser, 11 Cal. App. 373, 105 Pac. 130 (1912).

ciple is not known, or not distinctly recognized, in very many banks, and frequently presidents undertake to exercise a very considerable control in the daily routine of business. When this is done with the knowledge and approbation, or the tacit sanction, of the board of directors, it may be regarded as legalized by the principles of ratification or usage. Yet these afford an indefinite and dangerous basis on which to rest important dealings. A careful collation of all the adjudicated cases, it must be confessed, wears a striking and peculiar aspect, which is not very favorable to the assumption of any species of executive power by a bank president without direct authorization. With scarcely an exception, all the decisions are to the effect that the president had no right to perform some particular act, which he had undertaken probably in perfectly good faith to perform, and which had been called in question, and had given rise to the litigation in which it was condemned. So the reader will notice that in discussing this topic we are obliged, in order to keep within the bounds of established law, to confine ourselves almost wholly to declaring what a president can *not* do.

Charge of Bank's Litigation

(*b*) Indeed, it is a singular fact that the entire collection of judicial authorities justifies the enunciation of only one act as falling within the properly inherent power of the president. This solitary function is to take charge of the litigation of the bank.[0c] There is no question that this matter belongs to him by virtue of his office.[0d] He may institute and carry on legal proceedings [0e] to

[0c] If the president or other officers of the bank will not act the stockholders may do so. Feess *v.* Mechanics' State Bank, 87 Kan. 313, 124 Pac. 412 (1912).

[0d] National Bank *v.* Berry, 53 Kan. 696, 37 Pac. 131 (1894); Commercial National Bank *v.* First National Bank, 97 Tex. 536, 80 S. W. 601 (1904); First National Bank *v.* National Park Bank, 175 Fed. 881 (1910). And a vice president or any other officer who is acting for the time in the place and stead of the president has the same authority in case of emergency arising during his encumbrance of the office. Russell *v.* Washington Savings Bank, 23 App. Cas. (D. C.) 398 (1904). But the president cannot bind the bank to a contract of employment retaining the services of an attorney by the year for consultations and advice. Dent *v.* People's Bank, 118 Ark. 157, 175 S. W. 1154 (1915).

[0e] But if his own interests are in conflict with those of the bank the proceedings may be avoided without showing actual fraud. Gund *v.* Ballard, 73 Neb. 547, 103 N. W. 309 (1905).

collect demands or claims of the bank. He may appear, answer, and defend in suits against the bank. He may retain and employ counsel on behalf of the bank. Counsel requested by him to act for the bank will bind it by their action in the case, within the ordinary powers of counsel, by sole authority of their engagement by him. Nor will it make any difference, though circumstances render that engagement originally wrong or improper.[1] This would be his own breach of trust towards the bank, committed within the scope of his authority, damages for which the bank could only recover from himself, and which could affect no innocent outside parties, whether these should be the counsel employed, or the other litigants in the cause.

In Pacific Bank *v.* Stone,[1a] it was held that a president, or acting president, has no authority, as such, to engage an attorney, in addition to the regular counsel employed by the bank, unless with the sanction or ratification of the directors. It is to be noted in this case that the bank sued the attorney on a note, and he set up his special contract with the president. It would seem that he might have recovered against the bank on *quantum meruit* by showing that the bank received the services.

(*c*) The National Banking Act does not specify the powers of president or cashier. They are held, therefore, to have only such powers as are inherent in such positions by the very nature of things. All other powers are left to the directors. The president is generally, if not always, a member of the board of directors, and it is his duty to preside over their meetings. He has inherently only one power beyond that of any other director, viz. charge of the bank's litigation.[2]

(*d*) A bank president may, on sufficient consideration, contract with the defendant in a judgment in favor of the bank to enter a *remittitur*.[3]

(*e*) The president may receive a deposit for the bank, and it is not necessary for the depositor to show that such deposit was actually applied to her credit upon the books of the bank.[4]

[1] Savings Bank of Cincinnati *v.* Benton, 2 Met. (Ky.) 240; American Ins. Co. *v.* Oakley, 9 Paige (N. Y.) 496; Mumford *v.* Hawkins, 5 Den. (N. Y.) 355; Oakley *v.* Workingmen's Benevolent Society, 2 Hilt. (N. Y.) 487; Alexandria Canal Co. *v.* Swann, 5 How. 83, 12 L. ed. 60.

[1a] Pacific Bank *v.* Stone, 121 Cal. 202, 53 Pac. 634 (1898).

[2] Hodges, Executor, *v.* First National Bank, 22 Gratt. (Va.) 51.

[3] Case *v.* Hawkins, 53 Ala. 702 (1876).

[4] Juniper *v.* Bank, 48 S. C. 430 (1896).

(*f*) The offer of a reward made by the president of a bank, for information leading to the arrest of a defaulting paying teller, is binding on the bank, unless contrary to its by-laws.[5]

(*g*) And, in Guernsey *v.* Black Diamond Coal and Mining Co.,[6] it was held that the president by virtue of his office may make a valid assignment of a judgment in favor of a bank.

(*h*) The president may, for the purpose of making up a debt due the bank, take from the debtor property incumbered by other debts.[7]

(*i*) If the president commits a fraud, relative to a subject that concerns his duty to the bank, in dealing with persons having business with the bank, the bank will be liable to such third person.[8]

§ 144. (*a*) **Where the President has no Inherent Power,** he binds the bank in many cases by usage or express authority.

In Many Cases Bank Bound by President, though he has No Inherent Power to Act in the Matter

The cases, though largely occupied in deciding that a president has no authority by virtue of his office, yet hold the bank bound by his action wherever the charter, or a vote of the directors,[a] or usage of the bank, or long acquiescence by the bank in a course of action by the president,[0] or any facts constituting a holding out of the president by the bank as having a right to act for it, lay a foundation for authority actual or inferred, and whenever the bank has ratified his action.[01]

The general rule is, a corporation acts through its president, and through him executes its contracts and agreements, and an act

[5] Bank *v.* Griffin, 168 Ill. 314, 48 N. E. 154 (1897).

[6] 68 N. W. 777 (1896).

[7] Panhandle National Bank *v.* Emery, 78 Tex. 498, 15 S. W. 23 (1890).

[8] Bickley *v.* Bank, 43 S. C. 528, 21 S. E. 886 (1892).

[a] § 144. Rankin *v.* Tygard, 198 Fed. 795 (1912).

[0] Bell *v.* Hanover National Bank, 57 Fed. 821; Rankin *v.* Tygard, 198 Fed. 795 (1912); Citizens' Life Ins. Co. *v.* Owensboro Savings Bank, 150 Ky. 161, 150 S. W. 26 (1902); Griffin *v.* Erskine, 131 Iowa 444, 109 N. W. 13 (1906); Citizens' Bank etc. Co. *v.* Thornton, 174 Fed. 752 (1909).

[01] Quoted in Montgomery Bank *v.* Walker, 181 Ala. 368, 61 So. 951 (1913).

Even if the president of a bank has not the inherent power by virtue of his office to represent the bank in securing the execution of a bond guaranteeing the fidelity of its cashier, if the bank ratifies the action by suing on the bond it must accept it subject to the president's representation inducing its execution. Warren Deposit Bank *v.* Fidelity, etc. Bank, 116 Ky. 38, 74 S. W. 1111 (1903).

pertaining to the business of the corporation, not clearly foreign to the general power of the president, done through him, will, in the absence of proof to the contrary, be presumed to have been authorized to be done by the corporate body.[0a]

No Inherent Power over Bank's Property

(*b*) The control of the president of a bank over its property of any description whatsoever, from real estate down to a naked right to bring an action at law, is of the slightest. He has no power to draw checks in its behalf, or against its funds.[0aa] Nor has he authority to bind the bank by executing a note in its name.[0b] He is not the executive officer who has charge of its moneyed operations. It is not among his functions to withdraw or remove its deposited funds, or to use them for any purpose whatsoever. He cannot even employ any portion of the assets or credits of the bank for paying or settling with its creditors, unless by virtue of an express delegation of authority from the directors. He has no implied authority to use the funds of the bank to pay his personal obligations.[0c] He has no more power of management or disposal over the property of the corporation than any other single member of the board.[1] He has no power to allow overdrafts.[1a] Nor can he, even though clothed with the general authority to lend money, bind the bank by loaning its funds to himself or to the cashier who knows the loan is for the president's benefit.[1b] He cannot close the bank or

[0a] Bank *v.* Griffin, 168 Ill. 314, 48 N. E. 154 (1897). See Boyd's Exr. *v.* First National Bank, 128 Ky. 468, 108 S. W. 360 (1908).

[0aa] And if he draws checks on the funds of the bank in a trust company of which he is cashier and deposits them in a trust company to his own credit and afterwards draws them out the bank may, upon the insolvency of the trust company, recover the funds so deposited, since it is without fault. Bank of Roxie *v.* Lampton, 104 Miss. 427, 61 So. 452 (1913). But a general resolution of the directors containing no limitation on its face will justify payment by a depository of checks drawn by the president. First National Bank *v.* National Park Bank, 175 Fed. 881 (1910).

[0b] National Bank *v.* Atkinson, 55 Fed. 465.

[0c] Chrystie *v.* Foster, 61 Fed. 551.

[1] Gibson *v.* Goldthwaite, 7 Ala. 281. Where a president loses in speculative dealings and pays his brokers with drafts of the bank, the brokers are chargeable with notice that the drafts represent money embezzled from the bank. Beard *v.* Milmine, 88 Fed. 868 (1898); Lamson *v.* Beard, 94 Fed. 30 (1899). See Campbell *v.* Manufacturers' National Bank, 67 N. J. L. 391, 51 Atl. 497, 91 Am. St. Rep. 438 (1902).

[1a] Western Bank *v.* Coldewey, 120 Ky. 776, 83 S. W. 629 (1904).

[1b] McGregor *v.* Witham, 126 Ga. 707, 56 S. E. 55 (1906).

prevent the receipt of deposit by the bank.[1c] He cannot lease the real estate of the bank or cancel outstanding leases thereof.[1d] He cannot bind the bank to make good the default of another.[1e] But in California under the usages and customs of modern banking the president of a bank is its executive officer and the rule that his power is limited to transactions expressly authorized by the directors no longer obtains.[1f] These remarks, of course, refer to his inherent powers enjoyed *virtute officii;* for, of course, if any resolution [1g] or any established usage gives him the power, either at all times or under special circumstances, to draw against the corporate deposits, he may do so within the limits of the power. Thus, in a Tennessee case, a usage was shown for the president to draw checks when the cashier was absent, and the judges went the length of holding that he might legally do so in the absence of the regular cashier, even though a cashier *pro tem.* had been chosen.[2]

When the general management of the affairs of the bank is left, as is customary, with the directors, the president has not power to mortgage, assign, or pledge, any more than he has to dispose otherwise of any of its property of any description whatsoever, or for any purpose, however proper and justifiable in itself.[3] In the case in Selden's Reports the court say: "In Massachusetts it has been held that neither the president nor the cashier has power, *virtute officii*, to transfer negotiable funds, without express authority from the directors. This, however, must be erroneous, if the transfer be made in the usual course of business, and *bona fide.* But it is safe to say that, when the sale, assignment, or transfer

[1c] *Ex parte* Smith, 33 Nev. 466, 111 Pac. 930 (1913).

[1d] People's Bank *v.* Bennett, 159 Mo. App. 1, 139 S. W. 219 (1911).

[1e] Swenson Bros. Co. *v.* Commercial State Bank, 98 Neb. 702, 154 N. W. 233 (1915).

[1f] Bartlett Estate Co. *v.* Fraser, 11 Cal. App. 373, 105 Pac. 130 (1912); Roe *v.* Versailles Bank, 167 Mo. 406, 67 S. W. 303 (1902).

[1g] When "the board of directors gives the president the supervision of the conduct and business of said bank under the direction of the board of directors" a negotiation for the sale of property held by the bank is fairly within the presumptive authority of its president. Ida Co. Savings Bank *v.* Johnson, 156 Iowa 234, 136 N. W. 225 (1912).

[2] Neiffer *v.* Bank of Knoxville, 1 Head (Tenn.) 162; Fulton Bank *v.* New York & Sharon Canal Co., 4 Paige (N. Y.) 127. But as to when the bank is justified in paying on the signature of the president, see chapter on Checks.

[3] Hoyt *v.* Thompson, 1 Seld. (N. Y.) 320; Leggett *v.* New Jersey Manufacturing & Banking Co., Saxt. Ch. (N. J.) 542; Parker *v.* Carolina Savings Bank, 53 S. C. 583, 31 S. E. 673 (1898); Montgomery Bank *v.* Walker, 181 Ala. 368, 61 So. 951 (1913).

requires the use of the corporate seal, it cannot be made without the assent and authority of the board." However reluctant we may be to confess that the learned judge correctly interpreted the opinion of the Massachusetts court, it cannot be denied that his amendment thereof and the doctrine laid down by him are correct. But this is by no means necessarily to be construed as extending the power of the president to the performance of any of the acts specified. The judge says only that the president *or* cashier must be able to do them, and certainly the cashier is able to do them. Equally certain it is that there is no authority whatsoever for supposing that the intention was to declare the president also able to do them.

Cannot Release Claim, or Stay Execution

(*c*) The same species of limitation upon the power of the president forbids him to surrender or release [4] claims of the bank against any person, from whatsoever source arising; or to stay the collection of an execution against the estate of a judgment debtor; or to extend time to a debtor.[4a] For either of these acts is the exercise of a discretionary authority over the affairs and property of the bank, which is the peculiar and exclusive province of all the directors.[5]

No Inherent Power to Contract for Bank

(*d*) The president, unless specially empowered, cannot enter into contracts or agreements on behalf of the corporation.[5a] Authority so to do may, however, be conferred on him by the charter, by vote of the board of directors, or by the existence of such facts as constitute a public holding out, and warrant the public in be-

[4] Olney *v.* Chadsey, 7 R. I. 224; Swindell *v.* Bainbridge State Bank, 3 Ga. App. 364, 60 S. E. 13 (1908).

[4a] Arbogast *v.* American Exchange National Bank, 125 Fed. 518 (1913).

[5] *Ibid.;* Brouwer *v.* Appleby, 1 Sandf. Super. (N. Y.) 158; Sypker *v.* Spence, 8 Ala. 333.

[5a] Robertson *v.* Buffalo Co. National Bank, 40 Neb. 235, 58 N. W. 715 (1894); Arbogast *v.* American Exchange National Bank, 125 Fed. 518 (1913).

The president has no implied power to lease the bank's real estate or cancel leases which it has outstanding in respect thereto or enter into new ones for it as lessee. People's Bank *v.* Bennett, 159 Mo. App. 1, 139 S. W. 219 (1911).

lieving that the undertaking is within the scope of his legitimate delegated authority.[6]

No Power to Borrow

The president of a savings bank, having authority to carry on its general business, is not *virtute officii* empowered to borrow money on its behalf.[6a]

When President's Contract Binds Bank

(*e*) Where one transacts business or enters into contracts or agreements with the president of the bank, which in form run between the person upon the one part, and the president, described as such, upon the other, if it was understood by the party at the time that he was in fact dealing or agreeing with the bank, if he acted upon this supposition in good faith, if the president had from any source authority to bind the bank in such a transaction, and especially if the bank actually receives whatever benefit may accrue from it, — then there can be no doubt that the bank could be held to perform whatever was undertaken on its behalf by its president.[7] But if the president was acting beyond the scope of any authority derived from his office, or from directorial votes, or from usage, then his act, except of course by virtue of a subsequent ratification, could not bind the bank.[7a] Even where the president does not designate himself as such, yet the circumstances of the transaction may be put in evidence, to show, so far as they may be able, that he was in fact acting in his official capacity; and if this be established, the failure to designate himself formally by his official title will not affect the binding force of the transaction upon the bank. But if the dealing was with him as an individual, not as an officer, the bank has nothing to do with the affair.[7b]

[6] Mt. Sterling Turnpike Co. *v.* Looney, 1 Met. (Ky.) 550; Farmers' Bank *v.* McKee, 2 Pa. St. 318.

In Manny *v.* Spokane State Bank, 78 Wash. 230, 138 Pac. 682 (1914), the court held that the president of a bank which held a mortgage on insured property was acting within the apparent scope of his authority in contracting for repairs of the building after a fire.

[6a] Fifth Ward Savings Bank *v.* First National Bank, 47 N. J. L. 357, 1 Atl. 478 (1885).

[7] Tremont Bank *v.* Paine, 28 Vt. 24.

[7a] First National Bank *v.* Hanover National Bank, 66 Fed. 34.

[7b] It is for the jury to determine whether a contract made by the president in his own name was really made as agent of the bank. Northern National Bank *v.* Lewis, 78 Wis. 475, 47 N. W. 834.

Thus where one gave money to a bank president, who signed a receipt for it "to be deposited in the bank to the credit of A." and signed the receipt simply with his name alone, it was held that the facts were admissible to go to the jury for what they might be worth as tending to show that the money was paid to and received by the president in his official capacity on behalf of the bank; but that they were by no means conclusive of this, and that if the jury should find that the money was intrusted to the president as a private individual simply for the convenience of getting him to deposit it on behalf of A., then he was A.'s agent, and if he failed to make the deposit regularly and honestly, it was his individual, not his official default, and the bank was not liable.[8] Precisely to the same effect was the decision in Terrell *v.* Branch Bank.[9] Though the officer receiving the money was in this case a director, the principle of law is identical in the two rulings.

In Northern National Bank *v.* Lewis,[9a] a firm, which was indebted to a bank, gave to the president, in his own name, a contract under seal by which he received an option to purchase certain land. The contract further provided that in case he purchased the land he might retain out of the purchase price a sum sufficient to pay the indebtedness of the firm to the bank. It was held that parol evidence was admissible to show that the contract was taken by the president as agent of the bank, for its benefit, and as security for the payment of the firm's indebtedness.

When President's Act is that of the Bank. Receipt

(*f*) Government securities were given to a bank president to exchange; he, using bank paper, gave a receipt, signing his own name. In a suit to recover the value of the securities, the act of the president was held the bank's act.[10]

May Agree to receive Money on Note at a Place other than the One Named

(*g*) The president of a bank may, without special authority, agree with the payor of a note, or an agent, to receive the money at

[8] Sterling *v.* Marietta & Susquehanna Trading Co., 11 Serg. & R. (Pa.) 179.

[9] 12 Ala. 502.

[9a] Northern National Bank *v.* Lewis, 78 Wis. 475, 48 N. W. 834.

[10] Van Leuven *v.* First National Bank of Kingston, 54 N. Y. 671.

another place than that designated in the note for payment, to forward it to the bank where the note is held and payable.[11]

But the president of a national bank has no authority to agree to receive anything but money in payment of a non-negotiable note indorsed to it.[11a]

Cannot Discharge a Debtor of the Bank, even though He Substitutes Himself

(*h*) W., a director of a bank, owed it a note of $1000, and held $1000 of its stock. T., the president, agreed with him to buy the stock for himself, received it from him, handed it to the cashier, instructing him to hold it in place of W.'s note and to surrender the note to W., saying that he, T., would pay the amount to the bank. The cashier received the stock, stamped the note paid, and surrendered it to W. Held, that the bank, not having ratified the transaction, was not bound by it, and that it did not discharge W.'s liability upon the note.[12]

Nor can the president discharge himself as debtor.[12a]

Acquiescence

But where a president released the lien of a judgment, the long acquiescence of the bank was held a ratification.[13]

(*i*) A president cannot certify his own check; such certification is on its face notice of fraud to all.[14] Nor can he use the bank funds to pay his personal obligations.[14a]

Where the president of a bank certifies bonds left with the bank as trustee to be certified as called for, and uses them as collateral to cover his embezzlement, the bank cannot claim any rights thereunder against the owner.[14b]

Indorsement Good by Habit Known to Board

(*j*) The president has no inherent power to indorse or transfer negotiable paper belonging to the bank, but such authority may

[11] Vilas National Bank of Plattsburgh *v.* Strait, 58 Vt. 448.

[11a] First National Bank *v.* Alexander, 152 Ala. 585, 44 So. 866 (1907).

[12] Rhodes *v.* Webb, 24 Minn. 292 (1877).

[12a] State Bank of Isanti *v.* Mutual Telephone Co., 123 Minn. 314, 143 N. W. 912, 1915A Ann. Cas. 1082, n.

[13] Winton *v.* Little, 94 Pa. St. 64 (1880).

[14] Claflin *v.* Bank, 25 N. Y. 293. [14a] Chrystie *v.* Foster, 61 Fed. 551.

[14b] Washington etc. R. Co. *v.* Real Estate Tr. Co., 177 Fed. 306 (1910); Real Estate Tr. Co. *v.* Washington etc. R. Co., 191 Fed. 566 (1910).

be implied from his habit of doing acts of the same general character, known to the directors.[15]

One receiving a note from a president who has no authority to transfer it is not a *bona fide* holder, though he supposes the president to have such power, such supposition being a mistake of law.[15]

Where the president returns A.'s note, held by the bank, as paid, in consideration of the discharge of a mortgage held by A. and executed by the president in his individual capacity, which mortgage has never been held or pledged to the bank, the bank is not bound by the act of the president and the note is not thereby discharged.[15a]

Cases in which a Narrower Doctrine was Sufficient

(*k*) Such is the general doctrine, forbidding any species of contract to be made by a president on behalf of his bank. But in some few cases, such as will occasionally arise, in which the special contract could be condemned as invalid without the necessity of making the prohibition against contracting at all quite so sweeping and absolute, the courts have contented themselves with holding that a president cannot bind the bank in any unusual manner, or in any undertaking lying outside of its customary routine of business. Upon this narrower ground have been based rulings: (1) That a bank president has no right to agree to receive deposits of money on interest, it not being a part of the ordinary business of banking to do so.[16] (2) That the president cannot charge the bank with any greater liability for the safety of a special deposit than the bank is wont to undertake for such.[17] To the same principle may be also referred the ruling that the promise of the president and cashier that an indorser shall not be liable on his indorsement does not bind the bank, though it may be so specific as to bind the president and cashier as individuals. An agreement so contrary to the usual course of business and to the probable interest of the corporation can be made by no less an authority than that of the directors.

[15] Smith *v.* Lawson, 18 W. Va. 212 (1881); United States National Bank *v.* First National Bank, 79 Fed. 296 (1897).

[15a] Dundee National Bank *v.* Huntington, 20 App. Div. (Hun, N. Y.) 104 (1897).

[16] Fulton Bank *v.* New York & Sharon Canal Co., 4 Paige (N. Y.) 127.

[17] Foster *v.* Essex Bank, 17 Mass. 479.

In a recent case it is a *quære* whether the president of a bank has power to bind the bank by his agreement with an accommodation acceptor of a draft discounted by the bank that the bank will not look to him for payment of the draft (other security having been furnished to the bank by the drawer). It was not necessary to determine this point, because the arrangement between the president and the acceptor was merely verbal, and the court held it void under the Statute of Frauds.[18]

If the president negotiates notes for value, and at the same time executes in the name of the bank a written guaranty of payment, the retention and enjoyment by the bank of the proceeds of such transaction constitutes a ratification of the president's act.[18a]

Statutory, Charter, or Special Authority of President. — (*l*) In New York, special statutes have allowed many matters to be conducted in the president's name. Thus the bank may sue and be sued in the name of its president, provided the cause of action is distinctly laid to be for or against the corporation, and not for or against him.[19] Mortgages to secure subscriptions for stock property run to him. And it has been accordingly held that the assignment of such mortgages should be executed by him, personally, in his own name, with the addition of his official designation, and under his private seal, rather than under the corporate seal.[20] A transfer made to "D. L., President of the American Exchange Bank", was construed to be, by fair interpretation, a transfer directly to the bank,[21] with the same effect of vesting title as if it had been made to the bank itself by its corporate name. In support of this case the statutes of the State were referred to. But the reference seems needless, for the decision could well have rested solely upon the general principles enunciated. These perhaps afford some support to the doctrine advanced in the preceding paragraph (*k*), and certainly made the cited case useful as a general precedent, without regard to the effect of local legislation.

(*m*) A charter provision, or a directorial vote conferring a power upon the "president *and* directors", or the "president *and*

[18] Davis *v.* Randall, 115 Mass. 547.

[18a] Thomas *v.* City National Bank, 40 Neb. 501, 58 N. W. 943 (1894); Rich *v.* State National Bank, 7 Neb. 201.

[19] Delafield *v.* Kinney, 24 Wend. (N. Y.) 345; Ogdensburgh Bank *v.* Van Rensselaer, 6 Hill (N. Y.) 240; Pentz *v.* Sackett, Hill & D. (N. Y.) 113. See also Hunt *v.* Van Alstyne, 25 Wend. (N. Y.) 605.

[20] Valk *v.* Crandall, 1 Sandf. Ch. (N. Y.) 179.

[21] Leavitt *v.* Fisher, 4 Duer (N. Y.) 1.

cashier", will be strictly construed as conferring only a joint power, exclusively, and by no means a joint and several power. The execution can be by neither of the designated parties singly, but must always be strictly by both in conjunction.[22] Though, if both agree that a certain course shall be pursued, and that an executive act occurring therein shall be done by one alone, that act may be legally performed according to such arrangement. This is mere matter of detail, and pertains to the execution, not to the exercise, of the power. For example, where their power is to borrow money, if they agree upon all the items going to make up the transaction, but that the note given for the loan shall be indorsed by the cashier alone, this will be a perfectly regular and sufficient execution of the duty intrusted to them.[23]

Authority given by the directors to the president to sell and convey certain real estate includes an authority to enter into a valid written contract for such sale and conveyance to be made at a certain day future.[24]

(*n*) But where the president is authorized to execute to the purchaser of certain property, a bond of indemnity against the claims of a certain company, and said president, instead, executes a bond conditioned upon the bank's procuring from the company a good and sufficient lease of the property, the president exceeds his authority and the bank is not bound.[25]

(*o*) Where the president is held out to the public as empowered to attend to all the bank's business, he has authority to adjust a claim in favor of the bank by taking an assignment of a judgment, and such adjustment is valid if the agreement is afterwards carried into effect.[26]

§ 145. **Representations and Admissions of the President.** — Admissions of the president affect the bank only when they relate to matters within the scope of his agency.[1] The fact of his high

[22] Ridgway *v.* Farmers' Bank, 12 Serg. & R. (Pa.) 256; Maebean *v.* Irvine, 4 Bibb (Ky.) 17. Nor can they delegate their authority to a third person. Bryant *v.* Bank of Commerce, 95 Wis. 476, 70 N. W. 480 (1897).

[23] Fleckner *v.* Bank of United States, 8 Wheat. 338, 5 L. ed. 631.

[24] Augusta Bank *v.* Hamblet, 35 Me. 491.

[25] National Bank *v.* Levanseler, 115 Mich. 372, 73 N. W. 399 (1898).

[26] First National Bank *v.* New, 146 Ind. 411, 45 N. E. 597 (1896).

[1] § 145. Spalding *v.* Bank of Susquehanna County, 9 Barr (Pa.) 28; Panhandle National Bank *v.* Emery, 78 Tex. 498, 15 S. W. 23 (1890); National Bank of Rondout *v.* Byrnes, 84 App. Div. 100 (1903), 82 N. Y. S. 497. See remarks on Declarations and Admissions of Cashiers, *post.*

and responsible position does not operate to extend in any degree the rigidity of this rule of the common law.

(*a*) Representations of a president, made in transacting the bank's business, are admissible against it; but statements in which the bank has no interest are not; neither are declarations made after completion of the transaction.[1a] Like other agents, the president must act within the scope of his authority to bind his principal, unless his acts are ratified.[2]

He and the bank are different parties, and, in an action in which the plaintiff seeks to reach securities in the hands of the bank, the fact that the president, when called as a witness by the plaintiff, prevaricates, cannot be charged against the bank.[2a]

(*b*) The president has no inherent authority to make admissions that will release the maker of a note from his liability on it.[3] Nor has he authority to make representations that the maker of a note will not be liable thereon when the note is for the benefit of a corporation of which he and the maker are officers and the agreement is adverse to the interests of the bank.[3a]

By Usage, a President may Have Power to Take Debt out of Statute of Limitations

(*c*) The president, P., acknowledged a debt due from the bank to C., which was guaranteed by the E. firm, of which P. was a member. Not as inherent in his office, but by the custom of the bank,

[1a] First National Bank *v.* Booth, 102 Iowa 333, 71 N. W. 238 (1897); National Bank of Rondout *v.* Byrnes, 84 App. Div. 100 (1903), 82 N. Y. S. 497.

[2] Kennedy *v.* Otoe County National Bank, 7 Neb. 59.

The bank cannot be held even though it passes a resolution to indemnify the president against liability on a personal bond previously executed by him. People *v.* Mercantile Co-op. Tr. Co., 104 App. Div. 219 (1905), 99 N. Y. S. 521.

Where a bank claims credit for payments made by its president on a construction contract contra to its provisions it is estopped to deny authority of the president to make them. First National Bank *v.* Fidelity etc. Co. 145 Ala. 335, 40 So. 415, 117 Am. St. Rep. 45, 5 L. R. A. (N. S.) 418, n. (1906).

The president of a national bank cannot bind the bank by representing the signature of a note to be genuine. Commercial National Bank *v.* First National Bank, 97 Tex. 536, 80 S. W. 601 (1904).

[2a] Brown *v.* Thompson and Ohmstede, 79 Tex. 58, 15 S. W. 168 (1890).

[3] Hodges, Executor, *v.* First National Bank of Richmond, 22 Gratt. (Va.) 51; Farmers' National Bank *v.* Templeton, 40 S. W. 412 (1897); Fowler *v.* Walsh, 119 App. Div. 542 (1907), 104 N. Y. S. 54.

[3a] Bank of Le Roy *v.* Purdy, 100 App. Div. 64 (1905), 91 N. Y. S. 310.

P. had power to make such admissions, and his interest as guarantor did not destroy its effect, since his act did not affect his liability as guarantor; he was liable after as truly as before the admission. After so remarking, the court proceeded: "Can the admission of an unquestionable fact, which did not in any way affect his liability, or *promote his own interest*, or wrong his principal, be held to place him in a position antagonistic to his principal?"[4] Such admission may be made away from the bank.

(*d*) The president of a bank cannot by his admissions charge it with a debt.[5]

Representations not Affecting the Bank

(*e*) A., a business man accustomed to financial transactions, inquired of a bank president whether the bank paid interest on deposits. The president replied that it did not, but that he would give him a certificate that would. He thereupon gave A., for his money, an interest-bearing certificate of deposit with a banking firm of which the president was a member. A. noticed that the certificate was not that of the bank, and the president replied that it was all the same thing; that the firm owned the bank, and that A. could get his money at the bank at any time. The firm, in fact, owned 1500 of 2500 shares of the bank stock. The firm became insolvent; and it was held that A. had no claim on the bank. The president did not mislead A.; he knew the certificate was not that of the bank, and all the president told him was that the certificate was as good as the bank's, which was a matter of opinion, and would hardly base an action, unless the president knew the firm was in a dangerous condition, or otherwise was guilty of intentional fraud, and then the suit would be, not against the bank, but the president. The court distinguished the case from Steckel *v.* First National Bank of Allentown. In that case, the bank officers positively asserted that the certificates were those of the bank.[6]

[4] Morgan *v.* Merchants' National Bank of Memphis, 13 Lea (Tenn.) 234 (1884). See Morawetz, §§ 537–8.

[5] Henry *v.* Northern Bank of Alabama, 63 Ala. 527 (1879).

[6] First National Bank of Allentown *v.* Williams, 100 Pa. St. 123 (1882), distinguishing Steckel *v.* First National Bank of Allentown, 93 Pa. St. 376; Hein *v.* First National Bank, 76 Neb. 831, 107 N. W. 1019 (1906). See Patterson *v.* First National Bank, 73 Neb. 384, 102 N. W. 765 (1905), where in exchange for a check on the bank the president gave his personal time check but which the depositor believed to be a certificate of deposit.

(*f*) P., who was liable as second indorser on a promissory note held by a bank, met its president, and said to him, "Well, K. [the first indorser] didn't pay the note?" The president replied, "The matter is arranged." P. thereupon satisfied the judgment against K., which was held as a security against liability as indorser. In this case the president was not asked to say, nor did he say, how "the matter" was "arranged." His statement did not justify the inference that he meant to assert that the note was paid.[7]

(*g*) The president conspires with the cashier to rob the bank, and in pursuance of such conspiracy gives to a surety company a certificate required from the bank, and relating to the cashier's honesty. The directors having no knowledge of the misrepresentation, the bank is not responsible therefor. The giving of certificates relating to the character of employees is no part of the ordinary business of a bank.[8]

§ 146. **Knowledge of President.** — (*a*) A bank president knew the address of an indorser who should have been notified of the dishonor of a note; but as the president was absent, and the cashier did not know the address, the bank failed to give the proper notice. The court held the accidental absence of the president no excuse for the bank's failure to act on the knowledge possessed by him. An officer should provide for such contingencies; and between the bank, the negligence of whose president prevented proper action, and the indorser, entirely without fault and not receiving the notice to which the law entitles him, the loss clearly rests with the bank.[1]

Notice of Suit

(*b*) Notice of an action against the bank is well served on the president, though away from the bank.[2]

[7] First National Bank of Lock Haven *v.* Peltz, 186 Pa. St. 204, 40 Atl. 470 (1898).

When the president of a bank is a surety on a bond and induces his cosurety to execute a note to the bank by telling him it is for the purpose of satisfying the bank examiners, that it is a mere matter of form and that he will not be bound thereon, the bank is not chargeable with notice of his statements and they are no defence to an action on the note by the bank which has parted with value. National Bank *v.* Casper, 28 Tex. Civ. App. 334, 67 S. W. 188 (1902).

[8] American Surety Co. *v.* Pauly, 72 Fed. 470, 482; *id.*, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. 552 (1898). See U. S. Fidelity etc. Co. *v.* Muir, 115 Fed. 264 (1902).

[1] § 146. Central National Bank *v.* Levin, 6 Mo. App. 543 (1879).

[2] Village of Port Jervis *v.* First National Bank of Port Jervis, 96 N. Y. 550.

(*c*) In an action by an assignee in bankruptcy to recover of a bank a payment made to it, as in violation of U. S. Rev. Sts. § 5128, the bank is chargeable with knowledge of all facts in regard to the debtor's intention and solvency which its president had acquired while acting as president in its behalf.[3]

Whenever information is given to the president for the purpose of transmission through him to the bank, the law will regard it as having been so transmitted.[3a]

(*d*) Knowledge of the president of his own frauds, appearing upon books of the bank purposely kept by him in a manner to conceal the truth, is not attributable to the bank.[4]

And where the president kept a deposit, as executor, and fraudulently appropriated the fund to his own use, without the knowledge of the bank, the bank is not liable.[4a]

Where the president takes a note in order that he might use the funds of the bank by making a loan in which he had a personal interest, under the appearance that he had taken the obligation of the maker, and the purpose was to evade the law and deceive the bank examiner, the deception was a breach of trust and the maker of the note, who knowingly entered into the scheme, is liable thereon even though told by the president that he would not be liable.[4b]

(*e*) Knowledge of a president, who is also a member of the discount committee, that a note which was discounted for his benefit was given for an unlawful purpose, is not to be imputed to the bank.[5]

(*f*) Where the president, who is also a member of the discount committee, has knowledge that the indorser of a note has become

[3] Getman *v.* Second National Bank of Oswego, 23 Hun (N. Y.) 498.

[3a] Bartlett *v.* Woodbine Savings Bank, 57 Ill. App. 425; Millward *v.* Cliff Estate, 161 Pa. St. 157, 28 Atl. 1072; Smith *v.* Anderson, 57 Hun (N. Y.) 72; Chipman *v.* McClellan, 159 Mass. 363, 34 N. E. 379 (1893); Forbes *v.* Howe, 102 Mass. 427; Ditty *v.* Dominion National Bank, 75 Fed. 769.

[4] Lamson *v.* Beard, 94 Fed. 30 (1899). But see Cook *v.* American Tubing etc. Co., 28 R. I. 41, 65 Atl. 641, 9 L. R. A. (N. S.) 193, n., where a trust company was chargeable with knowledge that certain discounts were part of a fraudulent scheme on the part of its president to obtain money for his individual purpose.

[4a] Knobelock *v.* Germania Savings Bank, 50 S. C. 259, 27 S. E. 962 (1897).

[4b] Arthur *v.* Brown, 91 S. C. 316, 74 S. E. 652 (1912).

[5] Graham *v.* Orange Co. National Bank, 59 N. J. L. 225, 35 Atl. 1053 (1896).

incompetent to do business, but is not present when a renewal of the note is taken, and has no part in such transaction, nor knowledge of it until its completion, his knowledge is not enough to charge the bank with notice of such incompetency.[6]

But if the president who has actual control of all the affairs of the bank personally superintends and directs the discount before maturity of a promissory note belonging to him and of which he was the payee, his knowledge affecting the validity of the note is imputed to the bank.[6a]

(*g*) If the president of a bank, which is assignee of a note, receives notice that the same is for accommodation, and that it was made under an agreement which was violated by the transfer, without the consent of the maker, of certain collaterals given to secure the note, the bank cannot enforce payment against the maker.[7]

(*h*) Where the maker of a promissory note tells the president of a bank that said note was procured by fraud and that he will not pay it, such remark, not being made to the president in his official capacity, nor at the bank, nor with reference to the bank's business, does not bind the bank when it subsequently discounts the note.[8]

(*i*) The president's knowledge of fraud in obtaining notes payable to the bank is notice to the bank if such notice comes to the president in his official capacity.[9]

Knowledge of the president who is manager of the bank is knowledge of the bank where he acts for himself and for the bank in making a purchase of a note from himself.[9a]

When the president acquires knowledge outside of his official duties and it is to his personal interest to conceal it from the bank his knowledge will not be imputed to the bank.[9b]

(*j*) H., who is a school trustee, deposits the school funds in a common deposit with his own. He does this with the knowledge of the president and other officers. If H. draws money from the common deposit to buy a homestead, the bank, in order to claim a trust interest in the homestead as being purchased with the bank's

[6] Bank *v.* Sneed, 97 Tenn. 120, 36 S. W. 716 (1896).

[6a] McKinney *v.* Ellsworth, 165 Cal. 326, 132 Pac. 75 (1913).

[7] Smith *v.* Traders' National Bank, 74 Tex. 457, 12 S. W. 113 (1889).

[8] Washington National Bank *v.* Pierce, 6 Wash. 491, 33 Pac. 972 (1893).

[9] Wilson *v.* Pauly, 72 Fed. 129.

[9a] First National Bank *v.* Burns, 88 Ohio St. 434, 103 N. E. 93, 49 L. R. A. (N. S.) 764, n. (1913).

[9b] City Bank of Wheeling *v.* Bryars, 72 W. Va. 29, 78 S. E. 400 (1913). People's Bank *v.* Exchange Bank, 116 Ga. 820, 43 S. E. 269 (1902).

money, cannot set up the fact that the school money did not belong to H.[10]

(*k*) Where the president, acting in his own interest and not that of the bank,[10a] procures from the directors the discount of promissory notes given by the treasurer of another company, the directors having no knowledge or notice of any fact affecting the validity of the notes, the bank is not chargeable with the president's knowledge.[11]

When the president of a bank who is the owner of another bank, is insolvent and it is for his interest to keep such knowledge away from his bank his knowledge of insolvency at the time of executing a check is not to be imputed to the bank.[11a]

A president who makes a contract with himself against the interests of the bank is a stranger to the bank and his knowledge cannot be imputed to the bank.[11b]

(*l*) If the president for his own purposes obtains a promissory note from a third person, without consideration, and the cashier of the bank, although without authority, discounts the note at the president's request and places the proceeds to the credit of the latter, who uses them for his own benefit, and does not disclose to the directors of the bank the character of the note, or the nature of the transaction, the president's knowledge is not to be imputed to the bank, and the latter can recover on the note.[12]

Where one who takes certificates of stock in a bank as a pledge for a loan exhibits them to the president of the bank to learn if they have been properly issued and informs the president that the certificates have been assigned to him as security for a loan the knowledge of the president is the knowledge of the bank.[13]

If the president or cashier of a bank which purchased municipal

[10] Hale *v.* Richards, 80 Iowa 164, 45 N. W. 734.

[10a] See Dominion Trust Co. *v.* Hildner, 243 Pa. St. 253, 90 Atl. 69 (1914); Real Estate Trust Co. *v.* Washington etc. Ry. Co., 191 Fed. 566 (1910); American National Bank *v.* Ritz, 70 W. Va. 409, 74 S. E. 679, 40 L. R. A. (N. S.) 156 (1912); Bank of Le Roy *v.* Purdy, 100 App. Div. 64 (1905), 91 N. Y. S. 310.

[11] Corcoran *v.* Snow Cattle Co., 151 Mass. 74, 23 N. E. 727 (1894); Innerarity *v.* Merchants' National Bank, 139 Mass. 332, 1 N. E. 282; First National Bank *v.* Persall, 110 Minn. 333, 125 N. W. 506, 136 Am. St. Rep. 499 (1910).

[11a] American National Bank *v.* Millar, 185 Fed. 338 (1911). Approved in 229 U. S. 517, 57 L. ed. 1310, 33 Sup. Ct. 883 (1913).

[11b] Bank of Hartford *v.* McDonald, 107 Ark. 232, 154 S. W. 512 (1913).

[12] National Bank *v.* Babbidge, 160 Mass. 563, 36 N. E. 362 (1894).

[13] Curtice *v.* Crawford County Bank, 118 Fed. 390 (1902).

bonds had notice or knowledge of facts which would reasonably lead a careful person to make inquiry as to what the bonds were given for, no notice can be imputed to the bank when the purchase was not made by the one who had notice but by the one who had no notice or knowledge.[14]

§ 147. **Liability of President to Bank for Breach of his Trust.** — (*a*) A president of a bank, who, knowing a customer to be without means, induces him to open an account at a bank, and to overdraw that account, and who by his orders to the cashier establishes the custom of paying such overdrafts, may be held liable to the bank for the amount of the overdrafts.[1]

The president, P., who directed the cashier to pay the bank's money to N., an irresponsible person (in whose business P. was interested), without security, and charge it to N. on the bank books, is personally responsible to the bank for the money thus paid under his direction in violation of his trust.[2]

Where the president of a bank, its managing officer, took a note and paid $20,000 of the bank's funds for it with the knowledge that it was burdened with a guaranty which might destroy its value and cause loss to the bank, it is such negligence as will render the president liable to account for any loss which might result.[2a]

If the president negligently accepts doubtful securities in payment of good debts he is chargeable with any resulting loss.[2b]

A president is liable to the bank when he in neglect of duty or in fraud suffers his son to withdraw the funds of the bank without consent of the board of directors or advisory committee, and without collateral or other security whereby the bank sustains loss, and it is immaterial that the cashier and other directors are also liable.[2c]

When the president makes a pretended sale of his own shares of stock and discounts at the bank the notes received therefor with the understanding that they would not be enforced against him, such a transaction is a fraud and the bank may recover from the president what it paid on the notes.[2d] The president is liable when he wrongfully charges a depositor's account off the books of

[14] Thompson *v.* Mecosta, 141 Mich. 175, 104 N. W. 694 (1905).
[1] § 147. Oakland Bank of Savings *v.* Wilcox, 60 Cal. 127 (1882).
[2] First National Bank of Sturgis *v.* Reed, 36 Mich. 263.
[2a] Stearns *v.* Lawrence, 83 Fed. 738 (1897).
[2b] Lawrence *v.* Stearns, 79 Fed. 878.
[2c] Western Bank *v.* Coldewey, 120 Ky. 776, 83 S. W. 629 (1905).
[2d] Bassett *v.* Allison, 158 Ky. 621, 166 S. W. 204 (1914).

the bank and applies the amount thereof in payment of a note of the depositor's husband.[2e]

Selling Property without Authority

(*b*) As between the corporation and himself, a president of a bank ordinarily has no authority to sell the property of the corporation of which he is such officer. Before he can legally do so, he must have authority by the charter, the direction of the board of directors or managing committee, or by usage. And where the property of a bank is sold by a president without authority, and the bank suffers loss thereby, he may be held to respond in damages to the extent of such loss.[3]

Statute of Limitations

(*c*) The Statute of Limitations does not run to shield a president from suit by the bank to recover for damage by his fraud, until the fraud is discovered by the bank.[4]

Liability to Third Parties

(*d*) It is the duty of the president to use reasonable diligence to acquaint himself with the affairs of the bank; and, if by due diligence he can ascertain the condition of the bank, and fails to do so, he is responsible [4a] for any false representations in regard to that condition although made in good faith.[5] But in actions against him for making such representations, unless they were the inducement that caused the plaintiffs to continue their relations with the bank, they cannot recover.[5]

The unsalaried president is not liable for the negligence of the cashier who has charge of the executive affairs of the bank in lending upon insufficient security or beyond the limit fixed by statute.[5a]

[2e] Weems *v.* Melton, 150 Pac. 720 (Okla.) (1915).

[3] First National Bank of Central City *v.* Lucas, 21 Neb. 281 (1887).

[4] Atlantic National Bank *v.* Harris, 118 Mass. 147; McGregor *v.* Wetham, 126 Ga. 707, 56 S. E. 55 (1906).

[4a] A president who is a mere figurehead of the bank is liable only for gross neglect in its management and is not liable for permitting the cashier to make a loan beyond the statute limit. First State Bank *v.* Morton, 146 Ky. 287, 142 S. W. 694 (1912).

[5] Giddings *v.* Baker, 80 Tex. 308, 16 S. W. 33 (1891); Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742.

[5a] First State Bank *v.* Morton, 146 Ky. 287, 142 S. W. 694 (1912).

(*e*) The president is liable to a person who has suffered loss by a false statement or report of its affairs officially made or approved by him, especially when he has been personally benefited thereby.[6]

(*f*) The question of constructive knowledge by the president, sufficient to hold him liable for false statements made, should be found as a question of fact by the jury, under appropriate instructions from the court, and not be assumed by the court conclusively to exist.[7]

(*g*) The president is liable for a loan unlawfully, imprudently and negligently made without authority of the bank and without adequate security.[8]

§ 148. **Liability of One held out as President.** — P. allowed himself to be held out as president of a bank not legally organized. C. deposited money, which was lost by the cashier's mismanagement. C. sued P., as inducing his loss by giving an appearance of integrity to an unworthy institution. The court held the president chargeable with constructive notice of the management by the subordinate officers. The directors invite the public to deal with the bank, and the public has a right to expect reasonable care and oversight on their part; and the law will presume that P. knew of the cashier's action, as it was his duty to know.[1]

§ 148 A. **Liabilities for Acts of Other Officers.** — A president of a bank is not an insurer of the honesty of the cashier of a bank and is only expected to exercise ordinary care and supervision of officers in the discharge of their duties.[1]

§ 149. **Personal Undertakings for the Corporate Benefit.** — If the notes of the corporation are protested for nonpayment, and are thereafter paid by the president individually from his own private funds, for the honor of the bank, the whole transaction having been conducted throughout in strict good faith, the president becomes thereby a creditor of the bank for the amount so paid by him, and may prove the claim against the bank in insolvency.[1] But if the president guarantees or indorses the promissory

[6] Prewitt, Trustee, *v.* Trimble, 92 Ky. 176, 17 S. W. 356 (1891).

[7] Trimble *v.* Reid, 97 Ky. 713, 31 S. W. 861 (1895).

[8] Seventeenth Ward Bank *v.* Webster, 67 App. Div. 228 (1901), 73 N. Y. S. 648.

[1] § 148. Hauser *v.* Tate, 85 N. C. 81 (1881).

[1] § 148 A. Davenport *v.* Prentice, 126 App. Div. 451 (1908), 110 N. Y. S. 1056.

[1] § 149. Bank Commissioners *v.* St. Lawrence Bank, 8 Barb. (N. Y.) 436, 3 Seld. (N. Y.) 135.

notes of the bank, he will be presumed to do it gratuitously, and from the disinterested motive of promoting the welfare of the institution over which he presides. He will not be allowed to maintain any claim by reason of his so doing, except upon proof of an explicit contract entered into by himself with the government of the corporation.[2]

§ 150. **Payment of the President.** — With regard to whether or not a president is entitled to payment for his services, no absolute and unvarying rule can be laid down. No implied promise to pay him, any more than to pay any other director, is raised by his appointment to the office. On the contrary, it has been said that the presumption is that he is not to be paid.[0] Even for such a service as superintending the repairs upon the bank's real estate, it has been held in Massachusetts that the president cannot recover payment.[1]

But frequently a bank requires so much of the time of its president to be devoted to its interests and affairs that it in a great measure precludes or materially interferes with his prosecution of other and private business. In such cases it is customary to pay him a salary, as a cashier or any other officer who devotes his time to the service of the bank is paid. Ordinarily the matter of his compensation, in such cases, is left to be arranged by the board of directors,[2] and whatever they vote to pay him he has an unquestionable title to recover. But if they take no definite action in the premises, his right to demand pay will depend upon the nature of the services rendered by him, and upon all the circumstances attendant upon his acceptance and incumbency. If these suffice to show that he had a right to expect that he was to be paid, and that the bank or board of directors ought to have so understood, and ought to have expected to pay him, then he may recover what would have been a fair salary for the position.[2a] The pre-

[2] Leavitt *v.* Beers, Hill & D. (N. Y.) 221.

[0] § 159. See Withers *v.* Edmonds, 26 Tex. Civ. App. 189, 62 S. W. 795 (1901) where the court says that the positions of the president and teller are lucrative and that they are to be remunerated for such services as they may perform.

[1] Pew *v.* First National Bank of Gloucester, 130 Mass. 391.

[2] Holland *v.* Lewiston Falls Bank, 52 Me. 564.

[2a] Under the Illinois Banking Act the directors have no power to give the president a bonus (or sum in addition to his salary) in consideration of his "acceptance" of the presidency and the doing of acts outside the duties of his office. McNulta *v.* Corn Belt Bank, 164 Ill. 427, 45 N. E. 954.

sumption that payment is to be made arises where the work or employment is usually the subject of pay. But it does not attach simply because the work is valuable, and therefore *might* properly be given in exchange for money. The custom or usage to pay for such work must be existent, and established like any other custom or usage, so that it cannot but be presumed that the parties respectively conferred and accepted the office and functions of president in view of this custom and usage, and with the expectation of conforming to it. But informal statements, or remarks made by the president to various individuals, members of the board of directors, to the effect that he shall expect or require pay, have no bearing upon his rights whatsoever; especially where no definite reply appears to have been elicited.[3] If the bank charter distinctly provides that the president shall have no pay unless it be voted to him by the directors, any service which he may perform for the bank will be presumed to be done by him as president, and will give him no extraordinary right to pay, unless from its nature, or from evidence adduced, it is shown beyond a reasonable doubt that the act was really rendered outside of the duties appurtenant to the official position.[4]

Where his contract to serve as president is terminated by no act of the bank but by its suspension, which disables both the bank and the president from continuing its affairs, his salary ceases when the bank goes out of business.[5]

§ 150 A. **Power to tax President.** — A State act imposing a tax upon " presidents of each of the banks of the State", is inoperative as to presidents of national banks doing business in the State, as tending to impair the efficiency of national banks which are for certain purposes agencies of the Federal government.[1]

[3] Sawyer *v.* Pawners' Bank, 6 Allen (Mass.), 207; Olney *v.* Chadsey, 7 R. I. 224; Hargroves *v.* Chambers, 30 Ga. 580.

[4] Olney *v.* Chadsey, *supra.* [5] Elliott *v.* Peet, 192 Fed. 699 (1912).

[1] § 150 A. Linton *v.* Childs, 105 Ga. 567, 32 S. E. 617 (1898).

CHAPTER XI

THE CASHIER

§ 152. The cashier is the bank's executive, the performer. He has charge of the routine of the bank's business, but is not clothed with discretion in weighty matters amounting to management.

§ 153. Inherent Powers. §§ 114, 143.

§ 154. To draw checks on the bank's funds.

(*a*) Form of signature that will bind the bank.

(*b*) Parol admitted when on the face of the instrument there is doubt.

(*c*) The bank's liability depends not on form, but on the facts, the authority, and the intent of the parties. §§ 89, 94, 95 *a*, 97, 98.

§ 155. To certify Checks. See § 155 *f*; § 413.

(*a*) Not those given as collateral.

(*b*) Nor his own checks. See (*j*).

(*c*) Form of certification.

(*d*) President and teller may perhaps certify.

(*g*) Restrictions on the power of certification.

(*h*) Wrongful certification good as to innocent party.

§ 156. To buy and sell Bills of Exchange, and to arrange for exchange. *Quære* as to his power to accept bills for the bank.

§ 157. To control the Bank's Personality, unless withdrawn from his charge by the directors (§ 159), and to dispose of it in regular course of business.

§ 158. To indorse the bank's negotiable paper for collection, discount (see § 165 *d*), payment of bank's debts (?), (*h*, *g*), or to make over securities held for a debt when the same is paid. § 159 *g*.

But he cannot, by virtue of his office, indorse for accommodation, nor indorse the bank's name on his own paper (§ 169), nor transfer non-negotiable paper. See (*a*), § 158.

Bona fide holder without notice is secure. §§ 171, 565, n. 1[a]. See (*b*), § 158.

(*a*) General rule.

(*h*) Form of indorsement.

(*i*) Countersigning bank bills.

§ 159. To collect Debts due the Bank.
(*a*) To discharge a mortgage as an incidental power.
(*b*) To indorse notes for collection.
(*c*) Protest.
(*d*) Authorizing suit for a debt is an inherent power of cashier. §§ 143, 169.
(*e*) May *compromise* a claim as far as usage gives him authority, but has no inherent power. § 119.
(*f*) No inherent power to take anything but money. § 247.

§ 160. To borrow money in the bank's name in the regular course of business, and to give security or pledge. §§ 48, 63, 116 *a*.
(*a*) Borrowing on time.

§ 161. To receive deposits. § 179.

§ 162. To attend to the correspondence of the bank.

§ 163. To attend to the transfer of shares.

§ 164. To buy government bonds. §§ 59, 77, 164; II. § 35.

Special Authority.

§ 165. By organic law, vote, verbal order of board, usage and tacit approval (*c*), or by necessity (*d*). §§ 97, 116 *a*.
(*a*) Exercise of discretion.
(*b*) The law presumes regularity; and in favor of third parties the cashier is presumed to be acting within his authority if the nature of the act is such that he might be authorized to perform it.

§ 166. Notice to and Knowledge of Cashier. § 9, n. 9, §§ 104, 133, 146.

§ 167. Declarations and Admissions. § 42 *c*. 2, §§ 103, 124, 145, 167, 168, 203.
(*a*) and (*b*) Questions as to genuineness of paper.
(*c*) Past transactions.
(*d*) Representation as to payment of note held to bind the bank,
(*e*) and this even if the cashier had an adverse interest unknown to C. See, on this principle, §§ 99, 109, 125, 136, 167 *e*.
(*f*) Representations aside from duties as cashier do not bind.

§ 168. Limitations of Time and Place.
(*a*) Test. Can the business be as well done away from the bank as at the bank? §§ 45, 46.
(*b*) Checks may be drawn elsewhere.
(*c*) Indorsement elsewhere held good, also notice received away from bank.
(*d*) Must not pay or certify checks, nor in general give information away from the bank. § 412. But see (*h*).
(*e*) But *bona fide* holder is not affected by the cashier having acted in an improper place.
(*f*) Deposits must be received at bank.
(*g*) Bank may adopt an act wrongfully done away from it.

§ 169. No Power inherent.
To pledge the bank's property for antecedent debt.
Nor make an agreement to indemnify a sheriff.
Nor sue on bank's notes. § 159 *d*.
Nor release a surety.
Nor to indorse the bank's name on his own paper.

Nor to buy or sell realty for the bank, etc. See above, under Inherent Powers.
Nor to allow over-draft. § 357.
Nor to make loans to himself.
§ 170. On Instruments in form to or from the cashier, the bank may sue or be sued if the contract is really a corporate one, though the title "cashier" is omitted. §§ 95, 144 *e*.
§ 171. When the Cashier binds the Bank. §§ 89, 94, 95, 97, 98.
General rule.
Intra vires and *ultra vires* acts (*j*).
(*d*) Inherent powers and *bona fide* third parties. See also (*e*), (*f*).
(*g*) Holding out by failure to object.
(*h*) Payment of forged paper binds the bank.
(*i*) Implications from cashier's acts.
§ 172. Liability of Cashier to the Bank. §§ 79, 128, 129, 717 *c*; II. §§ 53, 253.
(*a*) Not responsible for his subordinates if he properly superintends them; and he is not obliged to examine every entry made by them, but only to exercise such care as a man of ordinary prudence does in his own business of a similar nature.
(*b*) Director's order will not excuse an act that the officer ought to know is wrongful.
§ 173. Cashier as Trustee.
His duty.
(*a*) Property bought with funds stolen from the bank not subject to a resulting trust.
(*b*) But equity will compel cashier to account.
§ 174. The Cashier's Subordinates.
Teller's power not exclusive of the cashier, but the justice of this ruling has been questioned.
(*a*) The teller.
§ 175. A temporary substitute's authority.
§ 176. Cashier after expiration of charter.
§ 176 A. Cashier estopped to deny his authority.
§ 180. When same Officer acts for two Institutions.

§ 152. **The Cashier is the Chief Executive Officer**, through whom the whole financial operations of the bank are conducted.[1]

[1] § 152. Merchants' Bank *v.* State Bank, 10 Wall. 650, 19 L. ed. 1019; Security Savings Bank *v.* Smith, 144 Iowa 203, 122 N. W. 825 (1909); First National Bank *v.* Greenville Oil etc. Co., 24 Tex. Civ. App. 645, 60 S. W. 828 (1901); Davenport *v.* Prentice, 126 App. Div. 451 (1908), 110 N. Y. S. 1056; Knapp *v.* Saunders, 15 S. D. 464, 90 N. W. 137 (1902); Pemiscot County Bank *v.* Central State National Bank, 177 S. W. 74 (1915); Ledgerwood *v.* Dashiell, 177 S. W. 1010 (Tex. Civ. App.) (1915). Its money transactions of every description, though they may not be determined by his discretion, will yet be conducted by and through him. Baldwin *v.* Bank of Newbury, 1 Wall. 234, 17 L. ed. 534; United States *v.* City Bank of Columbus, 21 How. 356, 16 L. ed. 130; McBoyle *v.* Union National Bank, 162 Cal. 277, 122 Pac. 458 (1912); Spongberg *v.* First National Bank, 18 Idaho 524, 110 Pac. 716, 1912A Ann. Cas. 95, n.; Citizens' Bank *v.* Douglass, 178 Mo. App. 664,

In the discussion of the powers and duties of cashiers we enter upon a very difficult topic. In no other branch of banking law are the usages of business so frequently at variance with the rules of law, so powerful in warping and altering those rules, so diverse among themselves in different places and different institutions, and at different times. In no other branch of banking law is it so difficult to reconcile the decisions and opinions uttered from numerous independent judicial tribunals, or to educe from them generalizations, principles, and rules in any satisfactory shape.

The key-note to the whole subject lies in this: that the office of the cashier is *strictly executive*. He is the business officer of the bank, but in the sense of one who *transacts* the business, not of one who regulates and controls it. The grand difficulty which has been experienced in defining his exact functions has always lain in the necessity of giving him sufficient practical power to enable him to conduct the daily routine of business without trespassing upon the domain of discretionary authority which pertains exclusively, and for the most part inalienably, to the directors. *Acts which demand only confidence in the integrity of the official, and familiarity with the forms and customs of business, acts strictly of performance, which do not rise to the importance of the semi-judicial character,* are those which he is properly delegated to do. But the responsible conduct and management of the affairs of the institution, upon the soundness and wisdom of which its prosperity and success depend, which call for the exercise of a high degree of care, knowledge, and experience, and a semi-judicial discretion, which demand general business qualifications of a high order, are not, and never have been held to be, appurtenant to the office of cashier. He is properly the executive agent of the directors.[2] It is his duty to carry out what they devise. They are responsible for the soundness of the action resolved upon; he is responsible for the honesty, accuracy, regularity, and skill with which that action is carried out. They are the mind and he is the hands of the corporation. They may decide to make a

161 S. W. 601 (1913); Taylor *v.* Commercial Bank, 174 N. Y. 181, 66 N. E. 726, 95 Am. St. Rep. 564 (1903); Houston Bank *v.* Kirkman, 156 Mo. App. 309, 137 S. W. 38 (1911); Arnold *v.* Waupaca National Bank, 126 Wis. 362, 105 N. W. 828, 77 Am. Dec. 759, n., 3 L. R. A. (N. S.) 580 (1905); Knoxville Water Co. *v.* East Tennessee National Bank, 123 Tenn. 364, 131 S. W. 447 (1910); Third National Bank *v.* St. Charles Savings Bank, 244 Mo. 554, 149 S. W. 495 (1912).

[2] Bank of Houston *v.* Kirkman, 156 Mo. App. 309, 137 S. W. 38 (1911).

certain loan or discount, to sell or mortgage corporate property. He will pay over the money, take the borrower's promissory note, and see that it is in proper form; he may, by direction of the board, affix the corporate signature and seal, and make delivery, on behalf of the corporation, of all instruments necessary to complete the conveyance or the mortgage. It is not wholly unapt to liken the board of directors to a bench of judges, and the cashier to the clerk of court.

§ 153. **Inherent Powers of Cashier.**[1] — There are certain functions which by long and universal usage have come to be recognized as belonging to the office of cashier, and have been judicially ascertained and declared to be inherent in the cashier as matter of law, and without any vote of the directors or provision of the organic law. Such power may of course be enlarged or restricted by the charter, the bank, or the board; but in the absence of such special action these "inherent" powers that are connoted by the title "cashier" belong to him by virtue of his appointment to such office.

§ 154. **Power to draw Checks.** — The cashier has power to draw checks or drafts upon the funds of the bank deposited elsewhere. Indeed, he is ordinarily the only officer of the institution who can legally do this. It is proper for him to designate himself as "Cashier of the —— Bank", in order to show that he is acting officially, and that the check is intended to withdraw corporate funds. But if he fails to make this fact clear by these or any other words in the instrument, yet, if the drawee bank pays the check from corporate funds, it will be protected and the payment will be valid, if, as a matter of fact, the cashier was acting officially,

[1] § 153. The question whether any particular act does or does not fall within the general power of a cashier has been said to be a question of law for the court, and not of fact for the jury. Farmers & Mechanics' Bank *v.* Troy City Bank, 1 Dougl. (Mich.) 457; Peninsular Bank *v.* Hanmer, 14 Mich. 208; Merchants' Bank *v.* State Bank, 10 Wall. 604, 19 L. ed. 1008. The services of a jury may indeed be called in when it is claimed that acts or conduct of the board have amounted to a public holding out, or that a banking usage relative to the subject of dispute exists. Merchants' Bank *v.* State Bank, 10 Wall. 604, 19 L. ed. 1008; Taylor *v.* Commercial Bank, 174 N. Y. 181, 66 N. E. 726, 95 Am. St. Rep. 564 (1903). But after the jury has found upon these matters, it still remains for the court to declare whether or not the usage is one which accords with and will be sanctioned by law; and whether the holding out was within the possible legal scope of a cashier's authority.

The power of the cashier generally exceeds that of the president. Montgomery Bank *v.* Walker, 181 Ala. 368, 61 So. 951 (1913).

and did intend to draw against the balance standing to the credit of his corporation. To prove this, parol evidence is admissible, and by such evidence the paying bank may even be allowed to explain away the fact that the check has been credited upon its books to the cashier's private account, and to rebut the inference against itself which must at first arise from this state of the accounts.[1]

Form of Cashier's Signature. Was the Act Official or Not?

(*a*) In Mechanics' Bank *v.* Bank of Columbia, the facts were briefly these. William Paton, Jr., cashier of the Mechanics' Bank of Alexandria, drew a check in form as follows: —

Mechanics' Bank of Alexandria.

No. 18. MECHANICS' BANK OF ALEXANDRIA, June 25, 1817.

Cashier of the Bank of Columbia,

Pay to the order of P. H. MINOR, Esq., Ten Thousand Dollars.

$10,000. WM. PATON, JUN.

Minor was the teller of the Mechanics' Bank. The check was one of the printed blanks from the official check-book of the bank. Other checks had been customarily drawn by the cashier on behalf of the bank, in the like form in all respects, save that he usually added "Cas." or "Ca." to his name. Much testimony was introduced with the object of showing that in drawing this check he was acting officially, and intended to draw it on behalf of the bank. Mr. Justice Johnson delivered the opinion of the court, substantially as follows: —

"The merits of this case lie within a very limited compass. The question is, whether a certain act, done by the cashier of a bank, was done in his official or individual capacity. Had the draft signed by Paton borne no marks of an official character on the face of it, the case would have presented more difficulty. But if marks of an official character not only exist on the face,

[1] § 154. Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. 326, 5 L. ed. 100; United States *v.* City Bank of Columbus, 21 How. 356, 16 L. ed. 130; Merchants' Bank *v.* Central Bank, 1 Kelly (Ga.) 418.

but predominate, the case is really a very familiar one. Evidence to fix its true character becomes indispensable. . . .

"Upon comparing the exceptions (taken) with the evidence, it does not appear that they affirm any other proposition growing out of that evidence, but that the check on the face of it purported to be the private check of Paton; and no extrinsic evidence could be received to prove the contrary.

"The ground on which it can be contended that this check was a private check is, that it had not below the name the letter 'Cas.' or 'Ca.' But the fallacy of the proposition will at once appear from the consideration that the consequence would be that all Paton's checks must have been adjudged private. For no definite meaning could have been attached to the addition of those letters without the aid of parol testimony.

Parol is Admitted when on the Face of the Instrument there is Doubt

(*b*) "But the fact that this appeared on its face to be a private check is by no means to be conceded. On the contrary, the appearance of the corporate name of the institution on the face of the paper at once leads to the belief that it is a corporate, and not an individual transaction; to which must be added the circumstances, that the cashier is the drawer and the teller the payee, and the form of ordinary checks deviated from by the substitution of 'to order' or 'to bearer.' The evidence, therefore, on the face of the bill, predominates in favor of its being a bank transaction. Applying then the plaintiff's own principle to the case, and the restriction as to the production of parol or extrinsic evidence could have been only applicable to himself. But it is enough for the purposes of the defendant to establish that there existed on the face of the paper circumstances from which it might reasonably be inferred that it was either one or the other. In that case, it became indispensable to resort to extrinsic evidence to remove the doubt. The evidence resorted to for this purpose was the most obvious and reasonable possible, viz.: that this was the appropriate form of an official check; that it was, in fact, cut out of the official check-book of the bank, and noted on the margin; that the money was drawn in behalf of, and applied to the use of, the Mechanics' Bank, and by all the banks and all the officers of the banks through which it passed was recognized as an

official transaction. It is true it was in evidence that this check was credited to Paton's own account on the books of his bank. But it was done by his own order, and with the evidence before their eyes that it was officially drawn. This would never have been sanctioned by the directors unless for reasons which they best understood, and on account of debits which they only could explain.

In General the Liability of Bank Depends not on Forms but on Facts. 1st, Authority of Agent; 2d, Intent of the Parties

(*c*) "It is by no means true, as was contended in argument, that the acts of agents derive their validity from professing on the face of them to have been done in the exercise of their agency. In the more solemn exercise of derivative powers, as applied to the execution of instruments known to the common law, rules of form have been prescribed. But in the diversified exercise of the duties of a general agent the liability of the principal depends upon the facts; that the act was done in the exercise and within the limits of the power delegated. These facts are necessarily inquirable into by a court and jury; and this inquiry is not confined to written instruments (to which alone the principle contended for could apply), but to any act with or without writing within the scope of the power or confidence reposed in the agent; as, for instance, in the case of money credited in the books of a teller, or proved to have been deposited with him, though he omits to credit it."

The law concerning the manner in which a cashier may sign checks intended to be officially drawn against deposits or funds standing in other banks to the credit of his own bank, is contained in the foregoing opinion, almost as in a nutshell. Any form of check whatsoever, and any form of signature, provided the instrument bears anywhere upon its face any indication of a corporate character, will suffice to open the door for the introduction of testimony to prove that in fact the character was corporate. And even though there be nothing on the face of the check to indicate its character, it might still be the corporate check, under the general principle that, if any agent has authority to make a written contract (not under seal), and makes it in his own name, whether he describes himself as agent or not (and even whether his principal be known or not, which in the case under consideration would

not happen), both the agent and his principal can hold the third party, C., and C. can hold them, unless from attendant circumstances it is clearly manifest that an exclusive credit was given to the agent, and it was intended by both parties that no resort should be had by or against the principal in any event.[2] If by usage or otherwise the cashier has authority from the bank to check against its funds in his own name, and he does so, the bank is ultimately liable on the facts, whether it is on the face of the check or not, and therefore the law holds it immediately liable.

If it can be collected from the whole instrument that it is the intent to bind the bank, it will be held, no matter how informal the expression, and, if unintelligible or uncertain, parol evidence is admissible to show what party is bound.[3] In the case just cited, a note signed by the president, directors, and secretary was held a corporate note; and in New York, where S. B. S. sent the plaintiff a bill of exchange payable to the order of S. B. S., Cash., and indorsed the same and enclosed it in a letter dated at bank and signed by S. B. S., Cash., the indorsement was held that of the bank.[4]

It cannot be doubted that proof that the check was drawn and signed in the manner in which the cashier was uniformly wont to draw and sign when he intended to draw on behalf of his bank, and which the drawee bank was wont to pay, without objection from the cashier's bank, out of its corporate credit, would always be regarded as *prima facie* and by most juries as conclusive evidence of the corporate character, and would, wherever the interests of justice required it, be held to estop the cashier's bank from denying this character. Whence it follows, that a check in any form customarily used by the cashier in drawing checks on behalf of his bank would be sustained at law as the check of the bank, however little in accordance with old-fashioned rules might be the agent's method of signing on behalf of his principal. Difficulty could only arise where the cashier had a private account at the same bank.

§ 155. **Power to certify Checks Inherent.** — By the universal usage of banks the certification of checks has become a part of the ordinary daily routine of banking business and is therefore inherent in the cashier's office, being a matter of execution requiring no great discretion. (See *f*.)

[2] Story's Agency, § 160 *a*.
[3] Haile *v*. Peirce, 32 Md. 327.
[4] Bank of Genesee *v*. Patchin Bank, 19 N. Y. 312.

Check given as Collateral

(*a*) But in case the check is not drawn in the usual course of business, as if it is given as collateral security, the cashier has no inherent authority to certify, and if the fact appears on the face of the check as where it contained the words "To hold as collat. for, etc.", the holder is put to his inquiry concerning the special power that would be necessary to enable the cashier to certify.[1] Of course the cashier has no right to certify, if the drawer has not sufficient funds in the bank, nor to certify his own checks. (See *j*.)

(*b*) The certification is usually made by writing "Good" across the face of the check, followed by the initials of the officer; but it may perhaps be done verbally,[2] — though it is much to be regretted that any such decision should have been made. For the effect of certification, see § 403.

We have here to deal with the powers and duties of the various bank officers concerning this transaction, developing the above points and considering the important cases bearing thereon. So soon as a check has been certified, the amount should at once be debited to the drawer and credited to the payee, or, as is sometimes preferred, to a "certified check account", upon the books of the bank. The payee thereafter occupies in several respects, as, for example, the running of the Statute of Limitations, the position of an ordinary depositor. Though of course he cannot insist upon the right to continue a deposit account if the bank does not wish to open it; neither can he draw checks against his credit, which is properly only to be paid over upon presentment and surrender of the accepted check. He is an ordinary contract creditor for the amount. The duty to make this entry is what might be described as a purely *internal* duty. It is a part of the mechanism of the institution itself. The neglect of the officials to do it may render them personally liable to the bank for any consequent loss, but does not affect the rights of any outside party. For the substance of the doctrines thus far laid down we have the direct authority of the Girard Bank *v.* Bank of Penn Township,[3] a case in which the object of the court seemed to be to refrain so far as possible from saying anything useful. Also we have the indirect

[1] § 155. Dorsey *v.* Abrams, 85 Pa. St. 299; Fidelity etc. Co. *v.* National Bank, 48 Tex. Civ. App. 301, 106 S. W. 782 (1908).

[2] Espy *v.* Bank of Cincinnati, 18 Wall. 604, 21 L. ed. 947.

[3] 39 Pa. St. 92.

authority of all the New York cases, which tacitly assume the inherent legality of certification as the necessary basis of all their decisions (*post*).

Form

(*c*) The most common form in which to express the certification is by simply writing upon the check the word "good", followed by the initials of the certifying officer. But it is not essential that this form should be observed. Any other writing, as the name or initials of the officer, or the word "good" alone, if intended and understood to bear this meaning, will be construed accordingly. In England the "marked checks", which in some respects, though not in all, resembled our certified checks, were customarily, until the statute interfered, literally only *marked*, and bore no written word whatsoever. It makes no difference how meaningless in itself may be the method resorted to, or even that, like the word "good", it might seem easily capable of a different meaning; it will be construed in reference to the customs and usages of the business, and to the understanding of the parties, and will be held valid or invalid solely in reference to this construction. It is a certification if it be done *animo certificandi*, if we may be allowed to coin the phrase. See (*b*) above, and Checks and Certification.

Who may Certify

(*d*) Rarely the president undertakes to certify checks; quite frequently the teller; but perhaps by far the most frequently the cashier.[4] By reason of this proportion it has always been assumed that, if the power be inherent in any office, it is inherent in that of the cashier.[4a] But here has been a grand question and doubt in this whole subject. Is it, or is it not, an implied power of the cashier, — a power which is to be assumed as constituting by custom one of the essential elements of his office and position, which it is to be taken for granted that he can exercise simply by virtue of the fact of his being cashier? Or, from another point

[4] Barnes *v.* Ontario Bank, 19 N. Y. 152.

"That the president or cashier of a bank *ex officio* has implied power to certify a check drawn in the usual course of banking business when presented for payment, seems to be well settled." Fidelity etc. Co. *v.* National Bank, 48 Tex. Civ. App. 301, 106 S. W. 782 (1908).

[4a] A cashier has no implied power to authorize an officer of another bank to accept checks in the cashier's name. United States National Bank *v.* First etc. Savings Bank, 60 Or. 266, 119 Pac. 343 (1911).

of view, Will his certification of a check bind the bank in favor of an innocent holder who had no actual notice that the bank had never clothed him with any such authority, nor intended that he should exercise it?

(*e*) The well-known case of Mussey *v.* The Eagle Bank[5] is the strongest authority against the inherent power. That case, it is true, passes directly only upon the power of the teller, but the line of argument is general enough to include also the cashier or the president. An effort was made to prove a usage for the teller to certify. But the evidence was declared wholly incompetent to sustain the usage, and the court went on to say that the usage, even if proved, would not have sustained the theory that the power was "inherent." For it would be a usage to allow the teller to pledge the bank's credit, a power which by the constitution of the bank can be exercised only by the corporate government, or under their special delegation, and consequently cannot be an implied or resulting function of any individual officer. Certainly it is sound to say that a power exercised by virtue of a usage is strictly a power exercised by virtue of a delegation of authority, which the law, by reason of the usage, conclusively presumes to have been made. Therefore the recognition of the fact that the corporate government *could* delegate this power carries with it a recognition also of the further fact, that the usage (which conclusively implies such delegation as matter of imperative law), if proved, would be good. Yet the tendency of the court in this case appeared so strongly opposed to any possible validity of the usage, that it has been often cited and commented upon as if it went to this length. In point of fact, it is an unavoidable logical sequence from the language used, that the usage, if shown, would be valid, though perhaps this result of his own words was not recognized even by the learned judge. A little fault also can be found with the phraseology in this opinion. Certification is said to be a *pledging of the credit of the bank*. This has a formidable sound, as though an act so important should be done by or under the immediate supervision of those officials who have the supreme discretionary control of the corporate business. But the phrase is deceptive. It is obvious that, in point of fact, if the transfer of credit from the drawer to the payee or to "certified check account" is duly made, contemporaneously with the certification, there is no possibility of any loss accruing to the bank.

[5] 9 Met. (Mass.) 306.

As well might it be said that, if A. draws his check in favor of B., both being depositors in the same bank, and B. deposits it, the shifting of the credit from the one to the other is a pledge of the credit of the bank. Practically, *instead of being called a pledge of credit, it should be considered a transfer of credit*, and should be regarded as a mere matter of book-keeping. It is true that the bank is bound by the acceptance, as by a promise to pay; but it is only a promise to pay a sum actually left with it for the express purpose of being used for such payment, and already due and owing. It is under a similar obligation to every depositor in the bank, though the ordinary depositor has no more accurate written evidence of the amount to his credit than is furnished by his bank-book. Before the acceptance the debt ran to A., the drawer; after the acceptance to B., the holder. There seems nothing very objectionable in allowing the cashier to make this change. These words, therefore, if they can be regarded as describing a business operation involving risk and calling for discretion, are in fact seriously deceitful. In many banks, where cashiers are not permitted to certify, they are accustomed, upon request, to give their "cashier's check", of which the practical effect is not to be distinguished from the result of certification, and which there can be no question of their power to do. The real objection to the practice of certification lies in the dread of its being abused by careless certification when there are no funds, or an equally careless subsequent paying out of funds on checks of the drawer, so as to reduce his deposit below the amount called for by the certified check. Theoretically, certification is harmless; it is neglect to abide by the theory that has brought it into unmerited disrepute.

Even if this case [6] could be construed, which we have tried to show that it cannot, to support the view that usage could not confer upon an officer the power to bind the bank by certification, yet in this it would stand alone against a great weight of contrary authority. The Pennsylvania case, cited above,[7] shows that in that State the power may be conferred, and will be upheld. And though the reticence of the judges is such that they do not intimate how it should be conferred, or under what circumstances it will be upheld, yet if it can be thus treated by any means, even by the most formal vote, it can also be sustained by inference resting

[6] Mussey *v.* Eagle Bank, 9 Met. (Mass.) 306.
[7] Girard Bank *v.* Bank of Penn Township, 39 Pa. St. 92.

upon proof of established usage. The New York cases are numerous, and united in sustaining the authority derived from usage.[8] It would seem to be a universal custom in that State for either the cashier or the teller to certify checks. Nothing being easier than to prove this custom, it was usually done at the trial of all the causes.

New York Declares the Power of Certification Inherent in the Office of Cashier. So U. S. C. C.

(*f*) But a recent case declares directly that the power of certification is inherent in the office of cashier, and criticises the Massachusetts decision quite sharply, as being based upon an idea that the power of certification was the creature of usage or custom. The decision is said to be twenty years old, to have been never reiterated in Massachusetts, to have been repudiated in New York and other States, and not now properly to be regarded as law, even in Massachusetts, so as to override "a general rule of construction, based upon the principles of the common law of universal application."[9] Previously the New York cases had not strictly been precedents upon the point of the inherent character of the power; though the Massachusetts case had already been severely criticised, and a plain willingness shown to override it upon necessary occasion.[10]

The most important case which has ever arisen concerning the power of the cashier to certify is that of the Merchants' Bank *v.* State Bank,[11] which was first tried in the United States Circuit Court for the first circuit, before Clifford and Lowell, JJ. The decision in the lower court was against the validity of the certified checks. The case was carried to the Supreme Court of the United States, and this decision was reversed. It was there held that the power of the cashier to do such an act might be properly inferred by the jury from the facts of his doing such cognate acts as draw-

[8] Farmers & Mechanics' Bank *v.* Butchers & Drovers' Bank, 16 N. Y. 125; Meads *v.* Merchants' Bank, 25 *id.*, 143; Clarke National Bank *v.* Bank of Albion, 52 Barb. (N. Y.) 592; Willets *v.* Phœnix Bank, 2 Duer (N. Y.) 121; and the New York cases cited in the remainder of this chapter.

[9] Cooke *v.* State National Bank of Boston, 52 N. Y. 96, affirming same case in 50 Barb. (N.Y.) 339, 1 Lans. (N. Y.) 494.

[10] In Farmers & Mechanics' Bank *v.* Butchers & Drovers' Bank, 16 N. Y. 125.

[11] 10 Wall. 604, 19 L. ed. 1008.

ing checks against the bank, borrowing and lending money, and the like. But substantially the court upheld the power as inherent in the office. It is the duty of the cashier, say the court, "to receive all the funds which come into the bank, and to enter them upon its books. The authority to receive implies and carries with it authority to give certificates of deposit and other proper vouchers. Where the money is in the bank, he has the same authority to certify a check to be good, charge the amount to the drawer, appropriate it to the payment of the check, and make the proper entry on the books of the bank. This he is authorized to do *virtute officii*. The power is inherent in the office." It should be remembered that the court is here dealing with the cashier of a bank organized under the act of Congress creating the national banking system of the United States, which act expressly allowed the bank to make such a purchase of coin as that for which this cashier had given these certified checks. The by-laws of the bank were also referred to, which made the cashier responsible "for the moneys, funds, and all other valuables of the bank"; and declared that "all contracts, checks, drafts, receipts, etc. shall be signed either by the cashier or president." But no especial knowledge of these by-laws was asserted or shown on behalf of the plaintiff, nor can it be said that they confer upon the cashier any more extensive or different authority than that naturally and customarily enjoyed and exercised by any cashier according to the ordinary and well-known usage and general manner of conducting the banking business.

The bank may expressly delegate the power of certifying to its president, its cashier, or its teller. But it would seem that the fact that such power is so specially delegated to any other officer than the cashier would not necessarily be exclusive of such power as inhering in the cashier also, at least in the absence of actual notice to any party to be affected.[12]

Judge Selden regards the teller as the more proper officer, on the ground that of course the cashier *could* certify, but that the teller's office is an offshoot of the cashier's, and has appropriated that peculiar description of duties, which renders it more *convenient* for the teller to assume this function also.[13]

[12] Merchants' Bank *v.* State Bank, 10 Wall. 604, 650, 19 L. ed. 1008.

[13] Farmers & Mechanics' Bank *v.* Butchers & Drovers' Bank, 16 N. Y. 125; Irving Bank *v.* Wetherald, 36 N. Y. 335.

Restrictions on Certification

(*g*) A bank which allows an officer to certify checks can of course impose upon his authority any restrictions it may choose. As usual, these restrictions will always be valid as between the officer and the bank. But if it should be decided that the power of certification is inherent in any special officer, or if local usage should be such that he is to be regarded as held out to the world as possessing the general power of certification subject to no unusual limitations, notice of the existence of such restrictions must be brought home to the knowledge of any third persons who are to be affected by them.[14] Notice that a bank has refused to become party to an agreement entered into between other banks in the same city, for settling clearing-house balances by certified checks, is not notice that the same bank does not permit its cashier to certify checks in the ordinary manner in the daily course of business. The two things are not equivalent.[15]

Wrongful Certification

(*h*) One limitation, however, the law lays down in all cases. A cashier cannot certify the check of a drawer who has not unincumbered funds in the bank sufficient to meet the check. Any person having notice of the fact that the bank had not enough of the drawer's funds on hand to meet the check at the time of certification, will be presumed to know that the act was unauthorized and void, and will not be allowed to hold the bank liable upon it.[16] But any outside party is justified in accepting the representation of the officer as to the sufficiency of the drawer's credit, or in assuming without special inquiry that all is right solely on the strength of the undertaking itself. Knowledge that the agent cannot certify without funds, is not knowledge that there are no funds. This is an extrinsic matter. A certification accepted on the faith of the cashier's or teller's statement that he was authorized to certify, would not bind the bank if he was not so authorized. But his statement, directly or by implication, that there are the requisite funds in the bank is of a different nature, and will bind the bank.

[14] Clarke National Bank *v.* Bank of Albion, 52 Barb. (N. Y.) 592; Merchants' Bank *v.* State Bank, 10 Wall. 604, 19 L. ed. 1008.

[15] Cooke *v.* State National Bank of Boston, 52 N. Y. 96.

[16] *Ibid.*, affirming same case in 50 Barb. (N. Y.) 339, 1 Lans. (N. Y.) 494.

Representations

(*i*) In general terms, it may be said that, where one dealing with an agent ascertains that the agent's act corresponds exactly with the terms of the power, he may take the agent's representation as to any extrinsic fact, peculiarly within the agent's knowledge, and not ascertainable by a comparison of the power with the act done under it.[17] "The certificate of the cashier of a bank that a check is 'good' is a representation of a present existing fact, within his knowledge as cashier; and if that certificate be made by him in the course of his ordinary business as cashier, it will bind the bank in favor of innocent third persons, upon the principle of estoppel *in pais*, even if the certificate be not true, and the drawer of the check has no funds on deposit in the bank."[18]

Whether banks are competent, by usage or express agreement, to extend their liability so as to include cases where the certification is known to be made without sufficient funds of the drawer, is a *quære* in Cooke *v.* State National Bank;[19] though it is said that Selden, J. has expressed an opinion in the negative.[20]

Officer cannot Certify his own Checks

(*j*) An officer, though authorized to certify generally, yet cannot legally certify his own checks. Apparently the rule covers equally cases where he has and where he has not money to the designated amount standing to his credit in the bank. The principles laid down in §§ 99, 125 seem sufficiently to sustain this position. But if this certification is false, we have the au-

[17] Farmers & Mechanics' Bank, etc. *v.* Butchers & Drovers' Bank, 16 N. Y. 125.

[18] Morse *v.* Massachusetts National Bank, 1 Holmes (C. C.) 209, per Shepley, J. And to the same purport is Pope *v.* Bank of Albion, 59 Barb. (N. Y.) 226.

A certified check is valid in the hands of a *bona fide* holder for value, although the maker had no funds in the bank when it was certified and even though a statute makes such certification a crime. Union Trust Co. *v.* Preston National Bank, 136 Mich. 460, 99 N. W. 399, 112 Am. St. Rep. 370 (1904); First National Bank *v.* Union Trust Co., 158 Mich. 94, 122 N. W. 547, 133 Am. St. Rep. 362 (1909); First National Bank *v.* Currie, 147 Mich. 72, 110 N. W. 499, 9 L. R. A. (N. S.) 698, 118 Am. St. Rep. 537 (1907).

[19] 52 N. Y. 96.

[20] Farmers & Mechanics' Bank *v.* Butchers & Drovers' Bank, 16 N. Y. 125.

thority of a thoroughly considered case for saying that it is utterly void as against the bank. The cause of Claflin *v.* The Farmers and Citizens' Bank turned upon the validity of the president's false certification of his own check, in the hands of a *bona fide* holder for value. In the Supreme Court it was not denied that the act was wrongful and unauthorized as between the bank and the president. But it was said that the mere identity of name signed upon the check as drawer with the president's name was not alone sufficient to charge the holder with notice that they were one and the same person; and there being no other proof of such notice, the bank was declared liable. But in the Court of Appeals this ingenious evasion of the wholesome rule was rejected. The identity of name was regarded as sufficient to put every one to whom it came upon inquiry as to whether the president was seeking to use his official character for his private benefit; and, indeed, it may be suggested that there was not alone identity in name, but the similarity of handwriting in the two signatures ought also to have been taken into consideration. In a final and very satisfactory decision, the bank was declared not to be bound by the acceptance.[21]

§ 156. **Dealings in Bills of Exchange.** — A cashier has inherent power to buy and sell bills of exchange, and to make contracts and arrangements to secure exchange, and provide for the acceptance of bills drawn by the bank. He cannot accept for the bank bills drawn against it, for accommodation, and whether he can accept at all is doubtful.

The business of dealing in bills of exchange is a department of the general business of banking. It may or may not be undertaken by the corporation, at its own option. If it is undertaken, the duty of buying and selling the bills and indorsing them over to the purchaser is within the ordinary scope of the cashier's office.[1]

[21] Claflin *v.* Farmers & Citizens' Bank, 36 Barb. (N. Y.) 540, overruled in 25 N. Y. 293. See Lowndes *v.* City National Bank, 82 Conn. 8, 72 Atl. 150, 22 L. R. A. (N. S.) 408 (1909).

When a cashier of a bank certifies his check drawn in payment of his indebtedness to another bank the transaction is illegal and void; the bank is put upon inquiry as to the authority of the cashier to so certify and it acts thereon at its peril. In such case the surety on the cashier's bond is liable for the amount of such payment. Rankin *v.* Bush, 93 App. Div. 181 (1904), 87 N. Y. S. 539; *id.*, 102 App. Div. 510 (1905), 92 N. Y. S. 866.

[1] § 156. Lafayette Bank *v.* State Bank, 4 McLean 208; Robb *v.* Ross County Bank, 41 Barb. (N. Y.) 586; Marvine *v.* Hymers, 2 Kern.

The presumption of his power to do so must, therefore, be imperative in favor of a third party dealing with him without notice to the contrary. But whether his general charge of this department would give him power to bind the bank by his acceptance of bills of exchange drawn against it, is a matter scarcely to be regarded as beyond a question. The cashier of the Bank of Kentucky was declared, in a State court, not to have this power by virtue of his office.[2] In Michigan, however, in ruling that a cashier could not accept bills for accommodation, it was said that such an acceptance would be void in the hands of a holder with notice of its character.[3] From this it might perhaps be inferred that the cashier could accept on behalf of the bank if it were for a *bona fide* purpose, not being accommodation. It is certain that the cashier never has authority to bind the bank by any of the numerous species of "accommodation" contracts, which, in one shape and another, are so common in business circles,[4] though an innocent holder may have a right to hold the bank.

Where a bill of exchange is indorsed by a cashier, though only for the purpose of transmitting it for collection, he becomes a "party" to it in the sense of a statute which makes a notarial certificate of notice of presentment and nonpayment to "parties" admissible as evidence of such notice; the certificate is evidence of notice having been given to the cashier, and therefore to the bank, since the subject matter falls within the scope of his agency.[5]

The cashier of a Kansas City bank orally agreed with a firm which was its New York correspondent, that, if the firm would accept certain drafts to the amount of $35,000 negotiated by the bank, it would keep on deposit with the firm until their maturity a balance equal to their amount, and the firm have a lien on such

(N. Y.) 223; Wild *v.* Bank of Passamaquoddy, 3 Mason 505; Fleckner *v.* Bank of United States, 8 Wheat. 360, 5 L. ed. 636.

The cashier of a bank has general authority to discount and rediscount paper owned by the bank and to sell and assign paper owned by it, for a valuable consideration, and if he sells a note in good faith and in the ordinary course of business his act is binding on the bank. First State Bank's Receiver *v.* Farmers' Bank, 155 Ky. 693, 160 S. W. 250 (1913). See Federal Reserve Act, Sec. II (*b*).

[2] Pendleton *v.* Bank of Kentucky, 1 T. B. Monr. (Ky.) 179.

[3] Farmers & Mechanics' Bank *v.* Troy City Bank, 1 Dougl. (Mich.) 457.

[4] West St. Louis Savings Bank *v.* Shawnee County Bank, 95 U. S. 557, 24 L. ed. 490.

[5] Bank of United States *v.* Davis, 2 Hill (N. Y.) 451.

balance as security, with the right to charge the account at any time with the acceptances, and appropriate to their payment so much of the deposit as necessary therefor; the firm to be kept informed of the condition of the bank, which the cashier stated to be embarrassed, but, with certain expected aid, able to continue business. *Held*, that this agreement was not invalid as against public policy, was not fraudulent as to the holders of drafts drawn on the firm after it was made, and was within *the power of the cashier to make*, both under his general authority, and by virtue of a by-law which gave him supervision of the bank, with duty to "attend to the making of loans, discounts, and other active business transactions of the bank."

§ 157. **Personalty.** — The cashier has full charge of the bank's personal property, except so far as withdrawn from his control by the bank or by the directors.[0]

The cashier has full charge, and power of disposition in the regular course of business, of all personal property of the bank, whether specie, notes, bills, bonds, securities, valuable papers, or of whatsoever other description of personal property the bank may have in its possession.[1]

He has the superintendence of its books of accounts.[2] Judge Shepley has given the following very good abstract of the ordinary duties of a cashier: "To keep the funds, notes, bills, and other choses in action of the bank, to be used from time to time for the exigencies of the bank; to receive directly, and through subordinate officers, all moneys and notes of the bank; to surrender notes and securities upon payment; to draw checks; to withdraw funds of the bank on deposit; and generally to transact, as the executive officer of the bank, the ordinary routine of business. But the ordinary duties of a cashier do not comprehend the making of a contract, which involves the payment of money, without

[0] § 157. McBoyle *v.* Union National Bank, 162 Cal. 277, 122 Pac. 458 (1912).

[1] Wild *v.* Bank of Passamaquoddy, 3 Mason 505; Franklin Bank *v.* Steward, 37 Me. 519; Morse *v.* Massachusetts National Bank, 1 Holmes (C. C.) 209; Hawkins *v.* Fourth National Bank, 150 Ind. 117, 49 N. E. 957 (1897); Davenport *v.* Prentice, 126 App. Div. 451 (1908), 110 N. Y. S. 1056.

A cashier who is the general manager of the bank has implied power to dispose of corporate stock by converting it into interest bearing securities. Johnson *v.* Bank of Pasco, 78 Wash. 59, 138 Pac. 295 (1914).

[2] Sturges *v.* Bank of Circleville, 11 Ohio St. 153; Baldwin *v.* Bank of Newbury, 1 Wall. 234, 17 L. ed. 534.

an express authority from the directors, unless it be such as relates to the usual customary transactions of the bank." [3]

§ 158. **Indorsement.** — The cashier has inherent power to indorse and transfer *negotiable* paper on behalf of the bank, for collection, discount (*f*), payment of the bank's debts (*e*, *g*), or by way of making over securities held by the bank on payment of the loan (§ 159 *g*), or in any other case arising in the regular course of business,[0] but has no inherent authority to indorse for accommodation, nor to put the bank's name on his own paper, nor to give title to any other than negotiable property of the bank.

Bona Fide Holder

Any indorsement made by the cashier on behalf of the bank, though wrongful, will bind the bank in favor of a *bona fide* holder for value without notice.[0a]

Form

Any form of indorsement will be good, even though only the name of the cashier without his title, if in fact the transaction was on behalf of the bank, and within the cashier's authority. See § 154 *b*. These points will now be illustrated and expanded.

May Transfer Bank's Negotiable Paper, but not Other Property

(*a*) All the bank's negotiable paper the cashier may negotiate and transfer on its behalf,[1] and to this end may indorse it over, so as to bind the bank like any ordinary indorser on similar paper. But the character of negotiability is a strict limitation upon his inherent power. He cannot, solely by virtue of his office, pass title to non-negotiable paper of any sort, or to any other description of corporate property, as, for example, a judgment given in favor

[3] Morse *v.* Massachusetts National Bank, 1 Holmes (C. C.) 209.

[0] § 158. If a cashier loans money to the bank and takes a note therefor, he may indorse the note and transfer it to another. First National Bank *v.* Anderson, 5 Ind. Terr. 118, 82 S. W. 693 (1904).

[0a] State *v.* Corning Savings Bank, 139 Iowa 338, 115 N. W. 937 (1908). (Indorsement by the president who was the bank's executive officer.)

[1] Wild *v.* Bank of Passamaquoddy, 3 Mason 505; State Bank *v.* Wheeler, 21 Ind. 90; City Bank *v.* Perkins, 29 N. Y. 554; Cooper *v.* Curtis, 30 Me. 488; Kimball *v.* Cleveland, 4 Mich. 606; Crocket *v.* Young, 1 Sm. & M. (Miss.) 241; Everett *v.* United States, 6 Port. (Ala.) 166; Bridenbecker *v.* Lowell, 32 Barb. (N. Y.) 9; McBoyle *v.* Union National Bank, 162 Cal. 277, 122 Pac. 458 (1912).

of the bank. His action in making transfers of this latter description can be sustained only by authority directly conferred by the directors, or arising from established usage.[2] Of course this power of transfer, like almost every power which an agent can possess, may easily be so abused by him as to render him liable to his principal. It is very difficult to say precisely how much discretion can be properly exercised by the cashier in trading in negotiable securities. Clearly he has no right to push it to that point where virtually it becomes a considerable and important branch of the bank's business, and is nevertheless conducted solely by himself. It was never contemplated, either by the legislature in conferring the franchise or by the stockholders in investing their capital, that trading in negotiable securities, if carried to such an extent as to become an essential and vital element in the corporate business and prosperity, should be conducted solely upon the single discretion of the cashier. The management of the important affairs of the institution was intended to be the function of the directors.

We can only state this principle in general terms. It would be a matter of infinite difficulty to draw the boundary line, and no adjudicated cases assist us in so doing. Certainly, in a well-ordered bank the directors would not allow the cashier to usurp their powers improperly in this respect. Nor could he do so without their knowledge.

Transfer without Authority

(*b*) It may also happen that a cashier may wilfully make a transfer or indorsement in direct disobedience to special directorial instructions. But in any of these cases of improper transfers by the cashier, he simply renders himself responsible to the bank for the consequences of his misconduct. The outside party dealing with him in good faith, and without notice of the irregularity, holds the bank as if the transaction had been unobjectionable throughout. For it is an inherent power of the cashier, which he exercises simply by virtue of his office, to make the transfer, and no person can be required, in a case where no circumstances of suspicion put him upon inquiry, to go behind this authority. If the agent exceeds it, the matter lies wholly between himself and his principal.[3]

[2] Barrick *v.* Austin, 21 Barb. (N. Y.) 241; Holt *v.* Bacon, 25 Miss. 567.

[3] City Bank *v.* Perkins, 29 N. Y. 554. In this case the cashier had pledged a note, which it was urged he had no right to do. The suit was

Indorsement for Discount, Collection, etc.

(*c*) Since the cashier has the general power to indorse over bills and notes of the bank, for the purpose of passing title therein, he of course has the lesser and included power to indorse for special purposes, as for discount. So also for collection, and for transmission for collection, he may indorse both paper belonging to the bank and paper intrusted to it for collection, or given to it as collateral security.[4] If paper is indorsed by him for this special and limited purpose, and is subsequently fraudulently converted, yet if the indorsement be general, and the paper comes to the hands of a *bona fide* holder for value and without notice, who presumes and has a right to presume from the style of the indorsement that it was made in the ordinary course of business, and created a guaranty on the part of the bank, the bank may be held to respond as an ordinary indorser.[5] The risk is voluntarily incurred by the bank in putting its indorsement in such a form that it does not convey notice of its true character when an attempt is made to use it fraudulently. It has been specially held that a cashier has power to indorse over negotiable paper in payment of debts of the bank;[6] also as preliminary to demand and notice, and to the institution of a suit upon it.[7] But these limited powers are of course included in the general authority which is amply supported by abundance of judicial decisions, and which may be stated in the broadest terms:—

General Inherent Authority to Indorse Negotiable Paper

(*d*) That the cashier, by his indorsement of negotiable paper on behalf of the bank will always bind the bank to the full extent

brought against the maker by a *bona fide* holder for value and without notice, claiming under the cashier's indorsement. The court did not pass upon the cashier's authority, holding that, whether he had it or not, yet the plaintiff had a sufficient title to protect the maker in paying to him, and could oblige him to do so. Gillett *v.* Phillips, 3 Kern. (N. Y.) 114: transfer by cashier of notes to an amount in excess of what he may legally transfer is void, *except* as to *bona fide* holder without notice. St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Mo. 421: transfer in bad faith binds in favor of *bona fide* holder for value and without notice.

[4] Elliott *v.* Abbott, 12 N. H. 549; Corser *v.* Paul, 41 *id.*, 24; Potter *v.* Merchants' Bank, 28 N. Y. 641.

[5] Robb *v.* Ross County Bank, 41 Barb. (N. Y.) 586; First National Bank *v.* Stone, 106 Mich. 367, 64 N. W. 487.

[6] Crocket *v.* Young, 1 Sm. & M. (Miss.) 241.

[7] Hartford Bank *v.* Barry, 17 Mass. 94.

that any individual indorser of like paper and in like form would be bound, unless the holder for value of the indorsed paper took it with actual notice of some fact rendering the indorsement irregular and invalid. Many of the cases cited *supra* in this section assert that the consideration for the transfer need not appear upon the instrument, but will be presumed. The presumption is open to rebuttal by proof that no consideration, or only an inadequate one, passed. But rebutting evidence of this description can be used only against the original transferee, or against a subsequent holder with notice.[7a]

A cashier may, in the regular course of business, assign and indorse notes belonging to the bank, and whether negotiable paper has or has not been authorized by the discount committee will not affect *bona fide* indorsees before maturity.[8]

Power to Pay Deposit with Negotiable Bills Doubted

(*e*) A cashier cannot assign discounted bills and notes to a depositor in payment of his deposit.[9] Assigning mortgages, or disposing of the bank's property, such as discounted bills, is a part of the management, and belongs to the directors.[10]

Rediscount Held Good

(*f*) The cashier has a general power to indorse, and if he has procured a *bona fide* rediscount, it will be good as within his implied

[7a] Where P., the cashier of A. bank, got the M. bank to discount a note payable to himself and indorsed by himself individually, and by the A. bank, by himself, as cashier, the fact that he was the first indorser, and that he personally received the avails of the note, did not amount to notice to the M. Bank. Merchants' National Bank *v.* McNeir, 51 Minn. 123, 53 N. W. 178.

Where the general authority of a cashier of a bank to transfer and indorse negotiable paper held by the bank is limited by a certain by-law, and the transferee has notice of such by-law, the transfer is void. *In re* Assignment Bank of Oregon, 32 Or. 84, 51 Pac. 87 (1897).

[8] Blair *v.* First National Bank of Mansfield, 2 Flippin 111 (1877). It is presumed that the sale of a note by the cashier was authorized or ratified by the board of directors. Hawkins *v.* Fourth National Bank, 150 Ind. 117, 49 N. E. 957 (1897).

[9] Lamb *v.* Cecil, 25 W. Va. 288 (1883); 28 *id.*, 659. Where a cashier paid a depositor by transferring notes to him it was held that the depositor held the notes and their proceeds in trust for the bank when garnished by its creditors. Schneitman *v.* Noble, 75 Iowa 120, 39 N. W. 224.

[10] Hoyt *v.* Thompson, 1 Seld. (N. Y.) 320. See § 14.

power,[10a] but he cannot bind his bank as an accommodation indorser of his own promissory note: such a transaction bears on its face notice of possible want of power.[11]

General Power to Discharge the Bank's Obligations with its Negotiable Paper Affirmed

(*g*) The cashier of a bank is usually intrusted with all the funds of the bank in cash, notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He is accustomed to receive directly, or through the subordinate officers, all money and notes of the bank; to deliver up all discounted notes and other securities and property, when payment of the dues for which they are given have been made; and to draw checks from time to time for money, wherever the bank has deposits and pecuniary funds. In short, he is considered as the executive officer through whom and by whom the whole moneyed transactions of the bank in paying or receiving debts, and discharging or transferring securities, are to be conducted. It does not seem, therefore, too much to infer, in the absence of all known and positive restrictions, that he possesses the incidental authority, and indeed that it is his duty, to apply the negotiable funds, as well as the moneyed capital of the bank, to discharge its debts and obligations.[12]

Forms of Indorsement

Hence, it seems to be a natural conclusion that, *prima facie*, the cashier of a bank possesses the incidental authority to indorse the negotiable securities held by the bank, in order to supply the wants and to promote the interests of the bank, and any restriction upon such authority must be established by competent proofs, and will not be presumed to exist.[13]

[10a] Davenport *v.* Stone, 104 Mich. 521, 62 N. W. 722. See § 156, note.

[11] West St. Louis Savings Bank *v.* Shawnee, 95 U. S. 557, 24 L. ed. 490.

[12] Fleckner *v.* Bank of United States, 8 Wheat. 360, 361, 5 L. ed. 636; Cocheco National Bank *v.* Haskell, 51 N. H. 116; Merchants' Bank *v.* State Bank, 10 Wall. 604, 19 L. ed. 1008. See Powers *v.* Woolfolk, 132 Mo. App. 354, 111 S. W. 1187 (1908), holding that "the law is well settled that a cashier having the general charge and management of a bank has authority to transfer the bank's paper as collateral security for the bank's debts."

[13] Wild *v.* Bank of Passamaquoddy, 3 Mason 505. See also Folger *v.* Chase, 18 Pick. (Mass.) 63; Spear *v.* Ladd, 11 Mass. 94; Northampton

(*h*) The various forms of indorsement which have been employed by cashiers have given rise to important questions concerning their respective validity. The possible divergence seems to be limited substantially to four different methods, viz.: "—— Bank, by A. B., cashier"; "A. B., cashier of the —— Bank"; "A. B., cashier"; or, finally, simply the name of "A. B." without any other words whatsoever. These are the four cardinal forms which alone call for consideration. Others are only slight modifications of these, such as "For the —— Bank, by A. B., cashier", or verbal variations by the use of simple abbreviations, as "Cash.", "Cas.", or "Cr." Such will be easily recognized as substantially identical with one or other of these four, and will be governed by the same rules respectively.

The Best Form. Second and Third Form

It is obvious at once that the first of these forms is the technically proper one. It alone accords with the old established rule of the common law of agency, that, where a contract is made through an agent, the principal must be directly named as the contracting party, properly with the addition of further words sufficiently indicating that the principal in this particular case is contracting through the instrumentality of A. B., authorized agent, and the signature must be in like manner of the name of the principal, with the additional intimation that it is written by his agent on his behalf.[14] But though it is safest and wisest always to indorse in this manner, and so to obtain the full protection of the ancient and general principle, yet special decisions have declared other forms, theoretically less correct, to be sufficient. So it can no longer be questioned that the second and third forms will bind the bank.[15] The words appended in those to the cashier's

Bank *v.* Pepoon, 11 Mass. 288; Corser *v.* Paul, 41 N. H. 24; Fay *v.* Noble, 12 Cush. (Mass.) 1; Elliott *v.* Abbott, 12 N. H. 549.

[14] Spear *v.* Ladd, 11 Mass. 94.

[15] State Bank *v.* Fox, 3 Blatchf. 431; Bank of Genesee *v.* Patchin Bank, 3 Kern. (N. Y.) 309; Northampton Bank *v.* Pepoon, 11 Mass. 288; Folger *v.* Chase, 18 Pick. (Mass.) 63; Robb. *v.* Ross County Bank, 41 Barb. (N. Y.) 586; Bank of the State of New York *v.* Muskingum Branch of Bank of State of Ohio, 29 N. Y. 632; Mechanics' Banking Association *v.* New York & Saugerties White Lead Co., 35 N. Y. 505; Elwell *v.* Dodge, 33 Barb. (N. Y.) 336. In this case it was held that the indorsement of "A. B., president", should be construed as the indorsement of the corporation upon proof furnished of the uniform usage of the corporation to indorse thus through its president. Ordinarily, the president has no authority to

name certainly signify very clearly that he was indorsing officially, and on behalf of the bank, and that the contemporaneous intention and understanding of both parties was that the bank should be bound by the indorsement. As a matter of fact, probably, in all such cases that ever occurred, the undertaking was really that of the bank, and the law, with its usual flexibility in such circumstances, found little difficulty both in sustaining it as such, and at the same time in adroitly saving the integrity of the ancient theory. It was declared, as appears by the cases cited in the last note, that, since the intent was to be regarded as sufficiently certain upon the face of the instrument, the holder was authorized to write above the signature the phrase "For the —— Bank", or "The —— Bank, by", etc., or any other words that might be necessary fully to express and to carry out the intent; also, that he might strike out any superfluous or inconsistent words originally written. The authorities which adopt this theory, and support the legality of indorsements made in the described forms, are ample to put the matter beyond the possibility of any future doubt. The only contrary decision to be found in the reports is one rendered by the Supreme Court of the State of New York, and this was very brusquely disposed of by a judge upon the same bench a short time after it had been given. His language was as follows: "The decision in the Bank of the State of New York *v.* Farmers' Branch of the State Bank of Ohio, 36 Barb. 332, is not a controlling authority; for I understand it has been reversed by the Court of Appeals; *and we must presume that the court, in giving that decision, were not aware that the point had been often decided the other way.*" It is not to be supposed that any learned justice will ever again lay himself open to such imputations upon his professional knowledge. It is going a good way, certainly, to uphold the third form, wherein the name of the corporate principal does not appear at all. The fact of what bank the indorser was cashier, and consequently what corporation was bound by his signature, must be shown by extrinsic evidence, and may well have been unknown to some even of the holders of the paper, if it has been

indorse on the corporate behalf. Marine Bank *v.* Clements, 3 Bos. (N. Y.) 600. The principle in this case is identical with that illustrated by the other citations. It has been held in Wisconsin, that, though the indorsement "G. B., Cas.", be made for accommodation (and therefore wrongfully), it will yet bind the bank as towards a *bona fide* holder for value without notice. Houghton *v.* First National Bank of Elkhorn, 26 Wis. 663.

widely negotiated. But the adjudicated cases support both forms without partiality. Indeed, they almost uniformly discuss only this third form. It seems as though the second form had always been tacitly admitted to be good, and only the third had held out hopes enough of invalidity to encourage litigation.

Fourth Form

But far as the courts have gone in declaring the indorsement in the third form to be binding as the indorsement of the corporation, they have yet much further to go if they are resolved to sustain the validity of the fourth form as a corporate undertaking. We find no adjudicated case which directly settles this point. But Judge Denio, in the case above cited, of Bank of Genesee *v.* Patchin Bank,[15] declared that it was " essential to the operation of the rule " (to wit, that the holder might supply, in the second and third forms, the name of the bank in such shape as to make it a principal indorser), " that the authority of the indorser to indorse for the corporation and to bind it, in full and due form, should positively *appear*." By the rule of § 154 *b*, it is enough if the facts make this authority " appear", whether the document indicates it or not.

(*i*) *Countersigning*, as for example of the bills and notes of the bank intended for circulation, may unquestionably be properly done by the cashier in the third form. If the marks of an official character, in whatsoever shape they may be, predominate upon the instrument, as they must upon these bills or notes, they are sufficient notice to third parties. Especially if the word " countersigned " be written or engraved in connection with such signature, it will be enough.[16]

§ 159. **Collection of Debts.** — A cashier has authority *virtute officii* to collect debts due the bank, and as incidental thereto he may receive payment (though not in anything but money unless by authority other than is inherent), deliver securities, pledges, and evidences of the debt paid, or discharge a mortgage, give the debtor a release or receipt, indorse and transmit notes to the place where they are payable, see that protest is made if necessary, and proper notice sent, and employ an attorney to sue for the debt. But has no inherent power to compromise a claim.

[16] Bank of Utica *v.* Magher, 18 Johns. (N. Y.) 341; citing Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. 334, 5 L. ed. 103.

May Give, Release, or Return Security, or Discharge Mortgage

It is the duty of the cashier to superintend the collection of debts owing to the bank, and to make up the accounts of the sums due. Payment of them is properly made to him in his official capacity, and discharges the debtor, even though the cashier subsequently misappropriates the money, and fails to bring it to account in the bank. Upon the receipt of payment, the cashier may deliver up the evidences of indebtedness held by the bank, may execute an acknowledgment, release, or acquittance to the debtor if need be, and may deliver and transfer back to him any pledge or collateral security given by him to the bank.[1]

(*a*) It has even been held that, where the borrower had given a mortgage of real estate to the bank, the cashier might legally discharge the same by virtue of his ordinary authority. Or, if the bank has bought the mortgaged property at sheriff's sale, the cashier may assign the certificate of sale. It makes no difference though the instrument may require to be executed under the corporate seal. The party who has made the payment is entitled to the discharge or assignment. In seeking to obtain it, he is justified in dealing with the principal business officer of the bank.[2] After all, it is a mere formal act, and though the corporate seal may be required, yet the ordinary assumption of the importance and high character of sealed instruments can hardly be said to attach to these proceedings. It was also suggested in the Bank of Vergennes case, that, if the directors alone could act in the matter, they might practically rob the payer of his legal rights, either by refusing to meet at all, or by neglecting to take action in the premises.

This power of the cashier is based upon the fact that he is the officer having the responsible charge and control of the entire personalty of the bank for all ordinary executive purposes; though if any portion of the personalty has been withdrawn from

[1] § 159. Concord *v.* Concord Bank, 16 N. H. 26; Badger *v.* Bank of Cumberland, 26 Me. 428; United States *v.* City Bank of Columbus, 21 How. 356, 16 L. ed. 130.

A cashier has authority to take collateral security for notes held by the bank. First National Bank *v.* Sing Sing Mfg. Co., 120 App. Div. 542 (1907), 104 N. Y. S. 1040, affirmed in 194 N. Y. 580, 88 N. E. 1119; Bank of Houston *v.* Kirkman, 156 Mo. App. 309, 137 S. W. 38 (1911).

[2] Ryan *v.* Dunlap, 17 Ill. 40; Bank of Vergennes *v.* Warren, 7 Hill (N. Y.) 91.

his charge and control, and devoted to any special use by the government, as where the directors had deposited a mortgage in pledge with the State authorities, the power and responsibility of the cashier cease in respect of the portion thus appropriated by his superiors in control.[3]

Indorsement and Transmission of Notes for Payment

(*b*) Whatever preliminaries are necessary to precede a valid demand for payment of money owing to the bank should be attended to and performed in due shape and season by the cashier. Such are the indorsement of notes payable to the order of the bank, and the transmission of them to proper agents in time for demand if they are payable at any distant place. The indorsement must be made in form according to the orders of the directors or the established usage of the bank in its dealings with the agent to whom the note is to be sent. Thus, it may be an indorsement in blank, an order to pay to the agent, or to the agent or his order, or to the agent for collection, or to the agent or his order for collection. If the cashier, whose duty and authority it is to make the indorsement in a certain one of these forms, makes it in another, as between himself and the bank, it is a breach of his official duty; and, if any injury result therefrom, he may be held liable in damages.

Protest

(*c*) If the note is not promptly paid, so that the formalities of protest become necessary, it is the duty of the cashier to see that the note is duly sent to the notary with proper instructions.[4] The cashier himself may act as notary, and his authority is not lessened even although he is the maker of the note.[4a]

[3] Mitchell *v.* Cook, 29 Barb. (N. Y.) 243.

[4] Hartford Bank *v.* Barry, 17 Mass. 94.

It is usually the duty of the cashier to see that notice of dishonor of paper is given to the persons entitled thereto. But the vice president by virtue of his office is not charged with such duty or in any manner liable if he fails to do so. First National Bank *v.* Bickel, 154 Ky. 11, 156 S. W. 856 (1913). And notice of dishonor must be given to an officer of a bank the same as to any other person unless it was his duty to give notice. First National Bank *v.* Bickel, *supra;* Frazee *v.* Phœnix National Bank, 161 Ky. 175, 170 S. W. 532 (1914); Ennis *v.* Reynolds, 127 Ga. 112, 56 S. E. 104 (1906).

[4a] Dykman *v.* Northridge, 1 App. Div. 26, 36 N. Y. S. 962.

Authorized Suit

(*d*) The cashier may also, it has been said, deliver notes to an attorney for collection, authorizing the institution of suits upon them, if it be necessary.[5] In this case the court finally propped the decision, which it at first inclined to render upon general principles, by stating that the particular cashier had been shown to have done the same thing before, and always with the knowledge and sanction of the corporation when it became notified of his action. But other decisions make it undoubted law that a cashier may employ an attorney to collect a claim without any resolution of the board, although that board has appointed counsel to attend to the bank's legal affairs. The power and duty to collect a debt necessarily include authority to set the legal machinery in motion to accomplish that result. For many purposes the officers and agents of a bank may employ persons to perform services for the bank, in the sphere of business that belongs to the agent, and it has been often declared that a managing officer or cashier may, without a vote of the directors, employ counsel.[6]

The cashier cannot appear and defend suits on behalf of the bank. Though he is the financial officer, and in charge of the books, and so might be supposed to have a peculiar knowledge in the matter, he cannot answer even where the bank is summoned as garnishee.[7] The only case where he has been allowed to take any part whatsoever in legal proceedings is one which was decided in Illinois, wherein his appeal was allowed to be good on behalf of the bank.[8] This single case is so utterly at variance with the general and uniform current of opinions upon the subject that it might very probably be expected to be overruled. Yet it does not seem unreasonable to sustain the views of the New Hampshire bench.[5]

[5] Eastman *v.* Coos Bank, 1 N. H. 23; Young *v.* Hudson, 99 Mo. 102, 12 S. W. 632. But he cannot authorize an attorney to assign claims.

[6] Root *v.* Olcott, 42 Hun (N. Y.) 538 (1886); Taylor on Private Corporations having Capital Stock, § 202. To the same effect, see American Ins. Co. *v.* Oakley, 9 Paige (N. Y.) 496; Peterson *v.* The Mayor, 17 N. Y. 449; Mumford *v.* Hawkins, 5 Denio (N. Y.) 355, 359 (1848); Bristol Bank *v.* Keavy, 128 Mass. 298; Frost *v.* Domestic Sewing Machine Co., 133 Mass. 563; Western Bank *v.* Gilstrap, 45 Mo. 419; Southgate *v.* Atlantic & Pacific Railroad, 61 *id.*, 89, 94.

[7] Branch Bank *v.* Poe, 1 Ala. 396.

[8] Moreland *v.* State Bank, 1 Breese (Ill.) 205.

May Compromise in Collection of Debt so far as Usage Sanctions his Course, but the Power is not Inherent

(*e*) It has been said, that, in the course of his fulfilment of his duty in taking all proper measures for securing the eventual collection of the debt, he may act about it by way of compromise.[9] In the New York case, wide discretionary power is restricted by the addition of the requisition that his action should accord with usage and the course of business. Unless the same restriction is added in the Pennsylvania case, it must be said that that case is at variance with general principles, which it cannot be potent to alter so materially. Without these words it must be simply impossible to reconcile these decisions with those which have been already cited as conferring upon the directors the power of compromising claims of the bank. Evidently the power is discretionary, and one which in its exercise may often call for considerable reflection and a high degree of judgment. It is strictly a sacrifice at least of nominal property of the bank. Clearly it should be a function of the board, and not of the executive officer. The cited decisions must be construed simply to intend that this function, though properly directorial, is nevertheless not inalienably so, and may therefore be delegated to the cashier; and that such delegation may be conclusively presumed as against the bank, upon proof that the usage and ordinary course of business in the bank is to that effect. Strictly speaking, this is all that the cases really decide, and it is obvious that they should not be carelessly stretched, as if they announced the general doctrine that it is an inherent element of the cashier's general authority to compromise on behalf of the bank any of its debts or demands.

In a later case the New York Supreme Court said that a cashier has no inherent power to compromise or release a claim of the bank; such business calls for the discretion which belongs inherently only to the board of directors.[10]

[9] Bridenbecker *v.* Lowell, 32 Barb. (N. Y.) 9; Bank of Pennsylvania *v.* Reed, 1 Watts & S. (Pa.) 101.

[10] Chemical National Bank *v.* Kohner, 58 How. Pr. (N. Y.) 267.

In Michigan a cashier has no authority to release an indorser or to compromise a claim unless such authority is directly or impliedly conferred upon him. Farmers' etc. Bank *v.* Clancy, 163 Mich. 586, 128 N. W. 752 (1910).

No Inherent Authority to Take Anything but Money

(*f*) The cashier has no authority to settle an account by taking private notes and drafts, and giving a receipt in full. That involves a discretion belonging to the board. Parties claiming a discharge otherwise than by payment must show the cashier's authority to settle with them.[11]

May Transfer Stock Held as Collateral

(*g*) It is within the general authority of the cashier of a bank to sign, in its behalf, a blank transfer upon a certificate of stock in the name of the bank, held by it as collateral security for a loan, and deliver the certificate to the pledgor on payment of the loan.[12]

§ 160. **Borrowing.** — The cashier has inherent power to borrow money in the regular course of the business of the bank, and may secure the loan by note or pledge of the bank's property.[0]

[11] Sandy River Bank *v.* Merchants' Bank, 1 Bissell 146. The cashier cannot, without express authority, take, in payment of a note held by the bank, a verbal assignment of an interest in another note already held by another bank as collateral security. Piedmont Bank *v.* Wilson, 124 N. C. 561, 32 S. E. 889 (1899). Nor can he accept in payment of a debt due the bank, certificates of the capital stock of an insurance company. Bank of Commerce *v.* Hart, 37 Neb. 197, 55 N. W. 631 (1893); Merchants' Bank *v.* Rudolf, 5 Neb. 527.

No officer of a national bank has any authority to agree to receive anything but money in payment of a non-negotiable note indorsed to it; so a bank is not bound to receive work in payment of a note. First National Bank *v.* Alexander, 152 Ala. 585, 44 So. 866 (1907): it is the duty of the cashier to pay his own obligations in cash, and so, without the consent or approval of the governing board, he cannot pay his obligations by accepting, as cashier, the note of a third person. First National Bank *v.* Gunhus, 133 Iowa 409, 110 N. W. 611, 9 L. R. A. (N. S.) 471, n. (1907).

[12] Matthews *v.* Massachusetts National Bank, 1 Holmes (C. C.) 396 (1874).

When a cashier is given authority to do what is "necessary in the management of the business of the bank" he has authority to sell stock which the bank has taken as security for a loan. McBoyle *v.* Union National Bank, 162 Cal. 277, 122 Pac. 458 (1912).

[0] § 160. Citizens' Bank *v.* Bank of Waddy, 126 Ky. 169, 103 S. W. 249, 128 Am. St. Rep. 282, 11 L. R. A. (N. S.) 598, n. (1907); Commercial Banking etc. Co. *v.* Citizens' Trust etc. Co., 153 Ky. 566, 156 S. W. 160, 1915C Ann. Cas. 166, n.

Executive officers of a national bank may, in the usual course of business and without special authority from the directors, rediscount their own discounts or otherwise borrow money for the bank's use. Cherry *v.* City National Bank, 144 Fed. 587 (1906).

If the Directors Restrict Him, they must Notify the Public. The Cashier's Power only Covers Loans to his Bank in Course of Business

The cashier may borrow money on behalf of the bank, and may bind the bank by a promissory note executed therefor.[1] Such is the usage of the banking business; though, if in any individual institution any other officer is selected for this duty, the cashier could no longer bind the bank to any lender who was aware of the variation. The right of borrowing is a function of which he will be wholly deprived by the act of the directors in selecting any other person as their general borrowing agent. But the usage to allow him to borrow is so universal, that *notice of the deprivation must be brought home to any person who is to be affected by it.* Otherwise the public are warranted in dealing with him on the assumption that he possesses it. The power extends only to borrowing in the ordinary course of the daily business of the bank. For example, if the bank be behindhand at the clearing-house, the cashier may properly borrow of any bank which has a surplus, giving in return his check or memorandum for the amount, and agreeing to pay the customary rate of interest. But he cannot borrow simply for the purpose of increasing the available funds of the bank, so that in effect its disposable working capital shall be increased. This is exercising a discretionary control over its affairs which none but

[1] Barnes *v.* Ontario Bank, 19 N. Y. 152; Ballston Spa. Bank *v.* Marine Bank, 16 Wis. 120; Sturges *v.* Bank of Circleville, 11 Ohio St. 153; Ridgway *v.* Farmers' Bank, 12 Serg. & R. (Pa.) 256; City National Bank *v.* Chemical National Bank, 80 Fed. 859 (1897).

The power of borrowing money is not prohibited by Missouri Rev. Sts. 1899, § 1294. And the fact that the cashier had no authority to execute collateral or even had no authority to execute a note without the consent of the board of directors would not be a defence to the loan even though there could be no recovery on the note. Union National Bank *v.* Lyons, 220 Mo. 538, 119 S. W. 540 (1909). Neither would a void guaranty be a defence for money had and received. Third National Bank *v.* St. Charles Saving Bank, 244 Mo. 554, 149 S. W. 495 (1912). But if the loan is made by plaintiff to a bank's cashier and the assets turned over to defendant bank this does not make the defendant liable. Gate City National Bank *v.* Miners' etc. Bank, 259 Mo. 551, 168 S. W. 725 (1914). The judge in the concurring opinion says that this case in principle overrules *in toto* Third National Bank *v.* St. Charles Saving Bank, *supra.*

Where a loan is actually made the borrowing bank is not relieved from its liability because it gives a note signed by its cashier personally and indorsed by itself when such is done to avoid disclosing an excessive loan. First National Bank *v.* State Bank, 15 N. D. 594, 109 N. W. 61 (1906).

the directors possess. Neither in any case can he borrow money to use for other than strictly banking purposes.

May Borrow on Time, if Usage Justifies It

(*a*) A. borrowed money in the bank's name, he being cashier, and appropriated it to his own use. The bank denied his authority, and the holder of the note introduced evidence of the custom of bankers in the vicinity to borrow money on time, which was admitted, thereby bringing the act within the cashier's inherent powers, as being a part of the ordinary routine of business. Evidence of other fraudulent drafts drawn by the cashier on other banks was held not admissible, unless the payee knew of them before making the loan in question, as otherwise he was not misled thereby.[2]

Pledge

(*b*) A cashier having power to effect a loan may (in the absence of statutory restraint and) in the ordinary course of business secure the loan by pledge of the property of funds of the bank.[3] And a creditor whose own debt against the bank does not exceed the limit that the bank is allowed by statute to borrow is not affected by the fact that there are other debts of which he has no notice which, added to his own, make an aggregate indebtedness greater than the bank can legally receive; and if the cashier of the bank obtains from the maker of the note a renewal note without surrendering the old one and pledges them to different banks as collateral security for a loan the maker is liable to both banks. However, in such case each bank must first exhaust its other collateral.[4]

§ 161. **Deposits.** — The cashier is the proper officer to receive deposits,[0] and give certificates of deposit or "other

[2] Crain *v.* First National Bank of Jacksonville, 114 Ill. 516, 2 N. E. 486 (1885).

[3] Coats *v.* Donnell, 94 N. Y. 176.

[4] Citizens' Bank *v.* Bank of Waddy, 126 Ky. 169, 103 S. W. 249, 128 Am. St. Rep. 282, 11 L. R. A. (N. S.) 598, n. (1907).

[0] § 161. But if another than the cashier has the apparent or ostensible authority to receive the money the bank is estopped to show that he has no such authority. Burnell *v.* San Francisco Savings Union, 136 Cal. 499, 69 Pac. 144 (1902).

When a cashier makes a contract with a woman to receive her deposit in a bank and substitutes his personal check in place of a certificate of deposit, her retention of the check for several months without demanding payment or making examination thereof does not estop her from claiming that the transaction was a deposit and not a loan from the cashier. Costello *v.* Citizens' State Bank, 140 Wis. 275, 122 N. W. 769.

vouchers."[1] And in him rests the power to accept or refuse the account of one who wishes to become a depositor,[2] though his decision may be overruled by action of the directors.

§ 162. **The Correspondence of the Bank.** — The cashier has charge of the correspondence of the bank. Letters on corporate business are properly addressed to him, and whatever statements or information are contained in them will, in law, affect the bank with notice. If the subject written about is one in which he has no authority to act, or no duty to perform, it is nevertheless his duty to communicate the contents of the letter to the officials within whose province the subject matter falls. It is his duty to see that the information contained in the letter is promptly laid before the proper person. A cashier has no power to contract for the bank, but if the negotiations concerning a proposed contract are conducted by letters, he properly writes and receives these, and the assent of the third party to the propositions of the bank, expressed by him in a letter written to the cashier, affects the bank, and completes the legal contract.[1]

§ 163. **Transfer of Shares.** — The cashier properly makes or superintends the transfer of shares. Any person showing *prima facie* a legal right to demand a transfer to himself, may demand it from the cashier, or from any other principal officer left in general charge and superintendence of the business of the banking-house. Any officer who can properly make the transfer at all will be pro-

[1] Merchants' Bank *v.* State Bank, 10 Wall. 604, 19 L. ed. 1008; L'Herbette *v.* Pittsfield National Bank, 162 Mass. 137, 38 N. E. 368 (1894); White *v.* Franklin Bank, 22 Pick. (Mass.) 181; Atlas Bank *v.* Nahant Bank, 3 Met. (Mass.) 581; Dill *v.* Wareham, 7 Met. (Mass.) 438; Morville *v.* American Tract Society, 123 Mass. 129; Davis *v.* Old Colony Railroad, 131 Mass. 258; Ellerbe *v.* National Exchange Bank, 109 Mo. 445; Ellis *v.* First National Bank, 22 R. I. 565, 48 Atl. 936 (1901); Rhinehart *v.* People's Bank, 89 Mo. App. 511 (1901); Abbott *v.* Jack, 136 Cal. 510, 69 Pac. 257 (1902); Musgrove *v.* Macon County Bank, 187 Mo. App. 483, 174 S. W. 171 (1915).

If the cashier knows or assumes to know the source from which the deposit arose he may include such a fact in his certificate if the customer consents or the business of the bank would be thereby subserved; and if by means of false statements therein another is directly injured the bank is liable in tort. Hindman *v.* First National Bank, 112 Fed. 931 (1902).

The cashier is the proper officer to execute a bond in the bank's behalf for the security of public funds. Johnson County *v.* Chamberlain Banking House, 80 Neb. 96, 113 N. W. 1055 (1907).

[2] Thatcher *v.* Bank of State of New York, 5 Sandf. (N. Y.) 121.

[1] § 162. New Hope & Delaware Bridge Co. *v.* Phœnix Bank, 3 Comst. (N. Y.) 166; Branch Bank *v.* Steele, 10 Ala. 915.

tected in making it, without going behind the apparent legality and propriety of the demandant's right, in order to determine whether or not there is any hidden cause for objecting to it.[1] A *prima facie* title is enough. As, if one who has bought shares sold by the State assessor for taxes asks for a certificate for them, the cashier is not only justified in giving it, but it is even his duty to do so, and the bank cannot subsequently be held liable on the ground of any original irregularity which should have altogether prevented the making of the sale.

§ 164. **Government Bonds.** — Cashier may agree for the bank to buy government bonds. In all transactions in which the bank may lawfully engage, the cashier is the executive agent, and a verbal understanding of the directors will not limit his authority as between the bank and third persons, when his acts over the counter are of a public character, and numerous and long continued.

If the directors, through inattention or otherwise, suffer the cashier to pursue a line of conduct for a considerable period without objection, the bank is bound.[1]

§ 165. **Special Authority.** — Beyond his inherent powers the cashier may be authorized to act for the bank, by the organic law, by action of the stockholders, by vote of the board or their verbal order, by usage and tacit approval, and by necessity or emergency calling for action manifestly to the interest of the bank.

The last section closes the list of the powers and duties which the cashier may exercise simply by virtue of his office, and within the scope of which he may bind the bank by reason of his being held out to the world as cashier, and as entitled to fulfil all the ordinary and inherent functions of that office. Outside those limits, however, there are great numbers of acts which are frequently undertaken by cashiers, which are strictly consistent with the nature of their office, and which are properly allotted to them for performance. Within this wide classification may be included everything of an executive character, and many matters partially discretionary, or discretionary within certain limits, so that in delegating power over them the directors do not in fact part with any governmental authority, or divest themselves of the performance of any inalienable duty.

[1] § 163. Smith *v.* Northampton Bank, 4 Cush. (Mass.) 1; Commercial Bank of Buffalo *v.* Kortright, 22 Wend. (N. Y.) 348.

[1] § 164. Caldwell *v.* National Mohawk Valley Bank, 64 Barb. (N. Y.) 333; Pensacola etc. Bank *v.* National Bank, 59 Fla. 347, 52 So. 294 (1910).

Exercise of Discretion

(*a*) That corporate agents, especially agents having such large and important general powers as are enjoyed by bank cashiers, should be allowed some degree of latitude of discretion is inevitable, and, within reasonable limits, is desirable.[1] But the power to exercise discretion, except in comparatively unimportant matters of routine, should be distinctly conferred by the directors, or very clearly proved by custom. Even if it be thus conferred or proved, it will be upheld only upon the condition that it is not a material encroachment or usurpation upon the governmental province. It has already been seen that of their obligations and responsibilities of this high nature the directors cannot strip themselves if they would. They are entitled to abdicate only by means of a direct and formal resignation.

The Law Presumes Regularity

(*b*) But if the act which the cashier assumes to perform is one intrinsically perfectly proper to be committed to his charge, the law will presume in favor of a third party dealing with him that he was duly authorized to perform it. The presumption is not conclusive, and may be rebutted. The third party simply makes out a *prima facie* case, which the bank may destroy by showing that neither a directorial resolution nor any usage had justified the cashier in his assumption of power.[2] In fact, the third party relies upon the character of the cashier, and trusts that that officer, doing an act which he may fairly be supposed to be enabled to do, is in truth acting regularly and under authority of some sufficient description. If he is deceived in this his trust, it can only be said that he voluntarily ran a risk in relying solely on the cashier's assumption, and that he must suffer the consequences of having neglected to assure himself from more accurate sources. The tendency of the courts is always, where an innocent party has been

[1] § 165. Stamford Bank *v.* Benedict, 15 Conn. 437.

[2] State *v.* Commercial Bank, 6 Sm. & M. (Miss.) 218; Commercial Bank of Buffalo *v.* Kortright, 22 Wend. (N. Y.) 348; Lovett *v.* Steam Saw Mill Association, 6 Paige (N. Y.) 54; Payne *v.* Commercial Bank, 6 Sm. & M. (Miss.) 24; Bank of Vergennes *v.* Warren, 7 Hill (N. Y.) 91; Harper *v.* Calhoun, 7 How. (Miss.) 203. In fact, it may be said that a very large proportion of all the cases cited in discussing the powers and duties of cashiers indirectly support this point. Regularity and legality are always assumed.

deceived by a cashier, to sustain the favorable presumption of the law, if it can be done; but they cannot disregard or overrule positive proof against it.

Authority by Vote, Verbal Order, Usage, or Quiescence

(*c*) Power may be conferred upon the cashier by a resolution, general in its terms, and not requiring to be repeated when each specific occasion for the exercise of the power comes up.[3] But proof that no resolution was ever passed by the board in the premises does not suffice to rebut the presumption aforesaid. This is only one of the props on which it is assumed to rest. Verbal directions from the board are amply sufficient. Usage and tacit approval still remain as possible or probable supports.[4] All these must be negatively disproved before the burden is shifted upon the shoulders of the innocent dealer or contractor.[5] Neither need the usage be specific in its character, nor confined to acts of precisely the same description as the one in question. If the directors have for many years allowed the cashier to do, without interference, all the business of the bank, they are held thereby to have conferred upon him authority to do anything and everything on the corporate behalf which the charter or law does not absolutely prohibit and forbid a cashier to do, and so render illegal under all circumstances.[5a] If the cashier has a power so wide and liberal as this, it is needless to prove a usage to do any particular act which he may have undertaken. If the act does not fall within the limits of unavoidable and inherent illegality, it is valid, and binds the bank, though a precisely similar act may never before have been undertaken by the cashier since the creation of the institution.[6] This doctrine

[3] Elwell *v.* Dodge, 33 Barb. (N. Y.) 336; Howland *v.* Myer, 3 Comst. (N. Y.) 290; Gillett *v.* Campbell, 1 Den. (N. Y.) 520; Bank of Vergennes *v.* Warren, 7 Hill (N. Y.) 91.

[4] Caldwell *v.* National Mohawk Valley Bank, 64 Barb. (N. Y.) 333; Whitney *v.* Foster, 117 Mich. 643, 76 N. W. 114 (1898). Where the cashier, in addition to his usual duties, is, in the absence of the president, running the bank under the advice of the executive committee, he has authority to bind the bank by a contract to renew notes, in consideration of the release, by the indorser, of a lien on the maker's property. Bank of Commerce *v.* Bright, 77 Fed. 949 (1896).

[5] Bank of Vergennes *v.* Warren, 7 Hill (N. Y.) 91; Stamford Bank *v.* Benedict, 15 Conn. 437.

[5a] Sherwood *v.* Home Savings Bank, 131 Iowa 528, 109 N. W. 9 (1906).

[6] City Bank *v.* Perkins, 4 Bosw. 420; 29 N. Y. 554.

Where the cashier seems to have had the complete control of the bank's business relations with other banks, of its mail and of its bookkeeping,

is certainly a liberal one towards innocent outsiders. One case, and only one case, appears to have gone farther. In Pennsylvania,[7] the court were discussing the power of the cashier in relation to the collection of debts owing to the bank. They declared that he had power to compromise, — a ruling which has been already discussed, and which certainly was going pretty far.

Authority by Necessity

(*d*) They then laid down this remarkable position, that in particular cases his authority may be extended by the nature of his agency and by implication arising therefrom, according to the pressure of circumstances in the business in hand; and, in reference to the facts under consideration, they were of opinion that the "necessity" of doing the act conferred upon the cashier the power to do it, which otherwise he would not have possessed. There is certainly sound reason, and probably sound law, in the doctrine that stringent necessity growing out of the unmistakable interests of the bank may sometimes justify a cashier in doing on its behalf some act which, in the absence of the emergency, he could not properly do; provided — and it is an essential proviso — the act be strictly consistent with "the nature of his agency." If the language of the court is to be construed as advancing only the principle that extraordinary cases may arise in which the courts will sustain the cashier in an act dictated by an obvious and imperative necessity, which he could legally perform under the authority of a usage or a directorial vote, and which, it must be presumed, the directors would unquestionably have authorized him to perform had they had warning of the need, and therefore had opportunity to act, — if this is what is intended, the doctrine is in the interest of justice and common sense, and may well be adopted into the body of legal principles. But if the theory was advanced that whatever seems necessary, in the liberal interpretation of that flexible word, to be done, may be legally done by a cashier simply by virtue of that necessity, that the power grows out of the circumstances of the particular case, it is bad in

if he uses the latitude thus given him to the prejudice of his bank it is unjust to make the bank with which he deals pay for the negligence of the directors of his bank. Pensacola etc. Bank *v.* National Bank, 59 Fla. 347, 52 So. 294 (1910).

[7] Bank of Pennsylvania *v.* Reed, 1 Watts & S. (Pa.) 101. See National Bank *v.* Equitable Trust Co., 223 Pa. St. 328, 72 Atl. 794 (1909).

law and mischievous in fact. No decision of any other bench, no language of any other judge, recognizes the existence of any such shifting and utterly indefinite test of the powers of a cashier. To admit it would simply be to introduce complete uncertainty, and to encourage litigation. Few men would abandon without an effort the chance of persuading a jury that it was in fact quite "necessary" for the cashier to deal as in fact he had dealt.

Rediscount Justified by Necessity

"It is the practice for the cashier of a bank in pressing emergencies to rediscount the bills and notes of the bank, to raise money to pay depositors and meet other demands of the bank. But this is only done on extraordinary occasions, and when the requirements are such as do not admit of delay. It is customary, wherever it can be done, to consult the directors, and obtain their consent to make such rediscounts. It is a matter which does not come within the ordinary duties of the cashier, and is not one of his inherent powers; but inasmuch as it is a power which is exercised by him under some circumstances, a transfer of such bills and notes made by him in the usual course of the business of the bank to a person who has no right to doubt the propriety of the transfer, or to question its good faith, will be *prima facie* valid, and vest a good title in the transferee. The validity of the transfer in such case will be sustained upon the ground that the transferee had a right to presume that the cashier had, from the board of directors, either an express or implied authority to make the transfer, and not because he had, by virtue of his office, inherent power to do so." [8]

§ 166. **Notice to and Knowledge of Cashier.** — Notice to the cashier that stock pledged is trust property is notice to the bank.[1] Where a loan was made by the bank to a trustee, who furnished collateral securities which the cashier at the time knew to belong to the trust funds, it was held that the bank was chargeable with the knowledge of the cashier, and was put upon its inquiry as to whether the trustee had authority to make this use of these securities.[2]

[8] Hoyt *v.* Thompson, 1 Seld. (N. Y.) 320; Hartford Bank *v.* Barry, 17 Mass. 97; Smith *v.* Lawson, 18 W. Va. 212; Lamb *v.* Cecil, 28 W. Va. 659, 660.

[1] § 166. Duncan *v.* Jaudon, 15 Wall. 165, 21 L. ed. 142.

[2] Loring *v.* Brodie, 134 Mass. 453.

Notice received or knowledge acquired by the cashier of a bank while engaged in the transaction of business according to the usage and practice of banking institutions, is notice to and knowledge of the bank.[3]

[3] Birmingham Trust Co. *v.* Louisiana National Bank, 99 Ala. 379, 13 So. 112 (1892); Br. Bank *v.* Steele, 10 Ala. 915; Bank *v.* Penland, 101 Tenn. 445, 47 S. W. 693 (1898); National Bank *v.* Stever, 169 Pa. St. 574, 32 Atl. 603; Niblack *v.* Cosler, 74 Fed. 1000; Witters *v.* Sowles, 32 Fed. 762; Third National Bank *v.* St. Charles Saving Bank, 244 Mo. 554, 149 S. W. 495 (1912); Rhinehart *v.* People's Bank, 89 Mo. App. 511 (1901); Citizens' State Bank *v.* Garceau, 22 N. D. 576, 134 N. W. 882 (1912).

The knowledge of a cashier who is manager of a bank and is in control of its property by authority of the board of directors that the bank is insolvent as a result of overdrafts by himself and vice president on a series of worthless notes is knowledge of the bank. Orme *v.* Baker, 74 Ohio St. 337, 78 N. E. 439, 113 Am. St. Rep. 968 (1906).

Where the cashier of a bank, which holds a note against third parties, is also trustee for such third parties, he is charged, as cashier, with knowledge of instructions received by him as such trustee, and his knowledge as cashier is the knowledge of the bank. Stebbins *v.* Lardner, 2 S. D. 127, 48 N. W. 847 (1891).

When a cashier executes a note in favor of lessees of a mill, one of whom is himself, the bank is charged with his knowledge. Skillern *v.* Arkansas Woolen Mills, 77 Ark. 172, 91 S. W. 303 (1905).

But the mere fact that the cashier of a bank is a stockholder and secretary of a corporation which is the payee of a note transferred to the bank is not sufficient to charge the bank with constructive notice of a defence to the note. Iowa National Bank *v.* Sherman, 17 S. D. 396, 97 N. W. 12, 106 Am. St. Rep. 778 (1903).

Where the cashier represents in a transaction, not only the bank, but a third party, for whom he is agent, the bank is impressed with all the knowledge of the cashier as to the *mala fides* of the transaction. Leonard *v.* Latimer, 67 Mo. App. 138.

When the bank by retaining money ratifies the act of its cashier in receiving the money it necessarily assumes the knowledge of the cashier that the money which he was receiving was fraudulently obtained. Fairfield *v.* Southport National Bank, 80 Conn. 92, 67 Atl. 471 (1907).

Where the cashier has notice that a person with whom the bank does business is incompetent, his knowledge binds the bank even though the notice did not come to the cashier while engaged in his duties. Brothers *v.* Bank, 84 Wis. 381, 54 N. W. 786; Walker *v.* Grand Rapids Co., 70 Wis. 92, 35 N. W. 332; Dresser *v.* Norwood, 17 C. B. N. S. 466; The Distilled Spirits, 11 Wall. 356, 20 L. ed. 167; Hovey *v.* Blanchard, 13 N. H. 145; Patten *v.* Merchants' Ins. Co., 40 N. H. 375; Hart *v.* Bank, 33 Vt. 252; Holden *v.* N. Y. Bank, 72 N. Y. 286; Fulton Bank *v.* N. Y. & S. C. Co., 4 Paige 127.

Whatever knowledge the cashier had, although acquired in his individual capacity, he, under the circumstances, carried over with him into the exercise of his duties and powers as cashier. He carried it with him into every transaction in which the bank participated through him. Lowndes *v.* City National Bank, 82 Conn. 8, 72 Atl. 150, 22 L. R. A.

But the cashier's knowledge of his own intention to commit fraud cannot be imputed to the bank.[4]

(N. S.) 408 (1909). In this case the cashier as administrator opened a deposit account in the name of the estate. He drew checks on the account and gave them to the teller and bookkeeper to substitute for worthless checks drawn by a company in which he was interested.

Where a cashier has notice that a check taken by the bank has been obtained by fraud, the bank is chargeable with his knowledge. Merchants' National Bank *v.* Tracy, 77 Hun (N. Y.) 443.

Where the cashier who is authorized to collect the liabilities of the bank has knowledge of bankruptcy proceedings of the bank's debtor and the bank does not file its claim the knowledge of the cashier is sufficient to impute knowledge to the bank. Perry Navel Stores *v.* Caswell, 63 Fla. 552, 57 So. 660 (1912).

When a cashier is in general charge of all the affairs of the bank with full power to control and manage the same in process of liquidation his knowledge is imputable to the bank. Metzger *v.* Southern Bank, 98 Miss. 108, 54 So. 241 (1910).

When a cashier who is managing agent of the bank takes a note to the bank as payee the bank is chargeable with his knowledge that the note was taken without consideration. McCarthy *v.* Kepreta, 24 N. D. 395, 139 N. W. 992, 1915A Ann. Cas. 834, n.

When a borrower of money from a bank protests to the cashier that the interest he is obliged to pay is excessive the notice to the cashier that the transaction is usurious is notice to the bank. MacRackan *v.* Bank of Columbus, 164 N. C. 24, 80 S. E. 184, 1915D Ann. Cas. 105, n., 49 L. R. A. (N. S.) 1043, n.

When one in an individual capacity sells paper to oneself as cashier one's knowledge, as cashier, of the infirmity in his title to the paper is imputed to the bank. Grebe *v.* Swords, 28 N. D. 330, 149 N. W. 126 (1914).

The knowledge of the cashier in purchasing certificates of stock must be imputed to the bank. Farmers' etc. Bank *v.* Loyd, 89 Mo. App. 262 (1901).

The knowledge of a cashier in extending the time of payment is imputed to the bank. Citizens' Bank *v.* Douglas, 178 Mo. App. 664, 161 S. W. 601 (1913).

[4] Indian Head National Bank *v.* Clark, 166 Mass. 27, 43 N. E. 912 (1896); Bank of Overton *v.* Thompson, 118 Fed. 798 (1902); State Bank *v.* Forsyth, 41 Mont. 249, 108 Pac. 914, 28 L. R. A. (N. S.) 501, n. (1909).

But a cashier's knowledge that a bank is insolvent as a result of his defalcations is imputed to the bank. Pennington *v.* Third National Bank, 114 Va. 674, 77 S. E. 455, 45 L. R. A. (N. S.) 781, n. (1913); Million *v.* Commercial Bank, 159 Mo. App. 601, 141 S. W. 453 (1911).

The cashier's fraud in procuring a note is imputed to the bank in its action on the note; his knowledge is presumptively that of the bank, and it makes no difference that he took some personal benefit from the fraud. Williams *v.* Hasshagen, 166 Cal. 386, 137 Pac. 9 (1913).

When a cashier of a bank who has its entire management and control draws a check on an elevator company of which he is treasurer, payable to the bank, presents them to himself as cashier and misappropriates the funds received therefrom, the knowledge of his fraudulent purposes at the time of presenting the checks will be imputed to the bank. Emerado

When a cashier acquired knowledge outside of his official duties which it is in his interest to conceal his knowledge will not be imputed to the bank.[5]

If the cashier is acting in his personal capacity either in dealing with the bank or in dealing with a third party the bank is not bound by any knowledge which he may acquire.[6]

If one who is a partner deals with himself as cashier of the bank his knowledge is imputed to the bank, but if he deals with others representing the bank his knowledge is not so imputed.[7]

§ 167. **Declarations and Admissions.** — A cashier has no power by his representations to raise any obligation that would amount to a contract which it is beyond his authority to make directly and formally. He cannot alter the effect of an enforcement by a representation that the indorser will not be looked to, nor bind the bank in any way by a declaration which would not bind him if he was the principal instead of an agent in the matter. Nor can he establish the extent of his authority to do business by his own representations.

But so far as he is expressly authorized by the bank or the board to make representations, and so far as his declarations are made in the course of, and pertain to, business in which his acts are the acts of the bank, so far his declarations and admissions (under the principles of § 103) are the acts of the bank, and have the same effect as if made by the principal under the same circumstances.

The cashier can bind the bank by his declarations or admissions only when his power to do so is a direct and necessary implication from the other powers confided to him by the bank.[0] His authority to declare or admit is strictly incidental, never original. When, however, the statements satisfy these requirements, they may be given in evidence for or against the bank with the like effect as the authorized admissions or declarations of any other agent may be given for or against his principal; and they will be conclusive,

Farmers' Elevator Co. *v.* Farmers' Bank, 20 N. D. 270, 127 N. W. 522, 20 L. R. A. (N. S.) 577 (1910).

[5] City Bank of Wheeling *v.* Bryan, 72 W. Va. 29, 78 S. E. 400 (1913); Hilliard *v.* Lyons, 180 Fed. 685 (1910).

[6] Pueblo Savings Bank *v.* Richardson, 39 Colo. 319, 89 Pac. 799 (1907); Melton *v.* Pensacola Bank, 190 Fed. 126 (1911).

[7] Taylor *v.* Felder, 3 Ga. App. 287, 59 S. E. 844 (1907).

[0] § 167. The statements or admissions of a cashier may be taken as the statements or admissions of the bank only when he is acting within the scope of his power or duty as the bank's agent or officer. Harrison County *v.* State Savings Bank, 127 Iowa 242, 103 N. W. 121 (1905).

or open to explanation or to rebuttal, according to the same general rules. It is likewise necessary, not only that, so far as the intrinsic nature of the admission or declaration is concerned, the cashier might bind the bank by it, but also that he should make it officially, and with the expressed or obvious intent actually to bind the bank by it. Thus he may bind the bank by statements officially made in relation to the sale of bills of exchange or drafts,[1] the business of selling and negotiating them being within his province. His declaration that stock pledged with the bank is held in trust for a third person may be given in evidence against the bank to prove notice of the trust;[2] it being his duty to take charge of all the property belonging or pledged to the bank, to know by what title and in what capacity the bank holds the various items, and to keep them duly ear-marked.[2a]

On the other hand, it can never be pretended that he has any incidental powers to bind the bank by declarations or admissions which are made beyond the scope of his duties.[2b] Thus, his statement or promise given to a person who is about to put his name as indorser upon a note which the bank has agreed to discount, to the effect that such person will not be held liable, or shall not be looked to by the bank, is altogether inoperative and void as an undertaking of the bank. For so far as the business of discounting is concerned, the cashier's sole power and function is to pay over the money upon the discounted notes. Collateral contracts or agreements of any nature are altogether beyond the range of his employment. Declarations or admissions in the nature of such contracts are equally beyond his province, and consequently equally valueless with the contracts themselves.[3]

[1] Sturges *v.* Bank of Circleville, 11 Ohio St. 153.

[2] Harrisburg Bank *v.* Tyler, 3 Watts & S. (Pa.) 373.

[2a] When a cashier has authority to employ one to find a customer to purchase certain lands his representations that such lands belong to the bank is conclusive upon the bank as to his authority to make the contract. Arnold *v.* National Bank, 126 Wis. 362, 105 N. W. 828, 3 L. R. A. (N. S.) 580 (1905).

[2b] When a cashier informs sureties on a note held by a bank, who are about to proceed against the principal that they need proceed no farther and that the bank would sue and protect them his statement is without the apparent scope of his authority and the sureties are released on the note to the extent they suffer loss from relying on the cashier's statements. Security Savings Bank *v.* Smith, 144 Iowa 203, 122 N. W. 825 (1909).

[3] Bank of the Metropolis *v.* Jones, 8 Pet. 12, 8 L. ed. 850; Bank of the United States *v.* Dunn, 6 *id.*, 51; Harrisburg Bank *v.* Tyler, 3 Watts & S. (Pa.) 373; Merchants' Bank *v.* Marine Bank, 3 Gill (Md.) 96; Cocheeho National Bank *v.* Haskell, 51 N. H. 116; Goodbar *v.* National Bank,

No Authority to Answer Questions as to the Genuineness of Paper, except by the Acts of Payment or Certification

(*a*) Payment made by the cashier upon a check bearing the forged name of a depositor, or by way of redeeming bills or notes falsely purporting to be those of the bank, is the payment of the bank. It is an act within the scope of the cashier's authority, and cannot subsequently be either recalled or repudiated. He is intrusted by the bank with the duty of deciding upon the genuineness of such paper when it is presented for payment or redemption. But if such paper is shown to him, not for the purpose of demanding payment thereon, but simply to inquire whether or not it be genuine, his erroneous answer that it is so will not bind the bank as an admission. For it is not his function to give such information. The bank does not intend that he should do so, or hold him out as competent to do so. When payment is demanded, it is an inevitable necessity that some officer should decide whether or not the paper is what it purports to be, and this necessity the bank can in no way avoid, without destroying the possibility of banking business. But to answer all questions which may be put concerning the genuineness of the paper is quite another thing. The same necessity does not exist for this, and the bank is accordingly presumed to refuse altogether to assume gratuitously a task of such dangerous responsibility. Therefore, if the cashier undertakes to answer such interrogatories, his act is wholly beyond the scope of any authority given him by the bank, and ought to be known by all persons to be so. The declaration is impotent to conclude the bank. Practically, if it were allowed binding force, it would amount to allowing the cashier to give a valid promise on behalf of the bank to pay what the bank does not in fact owe; a power which even the directors could rightfully exercise only in extraordinary cases, if ever. The difference between a payment actually made, though by mistake, and an executory agreement to pay, or acknowledgment of the sufficiency of the order calling for payment, made under the same mistake, is certainly wide enough to admit

78 Tex. 461, 14 S. W. 851 (1890); First National Bank *v.* Lowther-Kaufman Co., 66 W. Va. 505, 66 S. E. 713, 28 L. R. A. (N. S.) 511, n. (1910); Mutual Trust Co. *v.* Stern, 235 Pa. St. 202, 83 Atl. 614 (1912).

He has no authority to promise one who makes a note to be substituted for the cashier's own note in the bank, that he will not be looked to for payment of the note. State Bank *v.* Forsyth, 41 Mont. 249, 108 Pac. 914, 28 L. R. A. (N. S.) 501, n. (1909).

of this corresponding difference in the respective validity of the two acts.[4]

Representation as to Genuineness Held Binding. U. S. S. C.

(*b*) If a party presents a check drawn on a bank to its cashier for information, and the cashier says it is "good", the bank is bound by such answer as to the genuineness of the drawer's signature, and as to the sufficiency of his funds, but not as to the genuineness of the filling in.[5]

And it is bound in spite of the fact that the cashier knew there were no funds, if the party to whom he makes the assertion has no notice of its falsity.[6] It is part of the cashier's business to give information to checkholders as to the funds of the drawer. And the admission by a cashier that there are funds in the bank sufficient to pay a check is binding on the bank.[6a]

Statements as to a Past Transaction are Mere Courtesies, unless they Bear on a Present or Future Dealing in which the Bank is a Factor

(*c*) In the case of Franklin Bank *v.* Stewart,[7] an interesting point in this subject is discussed, which cannot be better elucidated than by presenting a brief summary of the remarks of the court. Statements, it was said, concerning a past transaction are given purely as a matter of courtesy. No one has a legal right to demand them. Consequently, a cashier in making them does not make them in an official character, or as an agent of the bank authorized to bind it by them. The most that can be said is that the bank does not forbid him to do an act of ordinary courtesy;

[4] Bank of the United States *v.* Bank of Georgia, 10 Wheat. 333, 6 L. ed. 334; Salem Bank *v.* Gloucester Bank, 17 Mass. 1; Merchants' Bank *v.* Marine Bank, 3 Gill (Md.) 96; Farmers & Mechanics' Bank *v.* Troy City Bank, 1 Dougl. (Mich.) 457.

[5] Epsy *v.* Bank of Cincinnati, 18 Wall. 604, 21 L. ed. 947.

[6] Farmers & Mechanics' Bank *v.* Butchers & Drovers' Bank, 16 N. Y. 125; Credit Co. *v.* Howe Co., 54 Conn. 357 (1887).

[6a] Simmons *v.* Bank, 41 S. C. 177, 19 S. E. 502 (1893).

But where the cashier states it as his opinion that the bank will honor a check, drawn by one who in fact has no funds in the bank, it is not such an unconditional promise as to lead one to accept the check from the maker. And, the maker having no funds in the bank, it is a promise to pay the debt of another, which, being oral, is void within the Statute of Frauds. Nichols *v.* Bank, 55 Mo. App. 81.

[7] 37 Mo. 519.

but it is equally far from empowering him to impress upon that act any other and more serious character. In Bank of Monroe *v.* Field,[8] admissions as to the fact of payment having been made upon a note, were held admissible as constituting a part of the *res gestæ*, but upon the express ground that they were shown to have been made upon, and as the result of, a contemporaneous examination of the books of the bank undertaken for this very purpose. But if the statement, though it concern a past transaction, is connected with a present dealing, the reason of the rule fails, and the rule itself shifts to the opposite doctrine. The test is well given in the following remark of Sir William Grant, in the cause of Fairlie *v.* Hastings:[9] "Unless the agent's statements constitute the actual agreement of the principal, or are the foundation of or inducement to that agreement, they are mere naked assertions, not proofs, of the fact; and being such, they amount to nothing." The facts of Franklin Bank *v.* Stewart were these: A messenger was sent to the bank to inquire whether a certain note had been paid. He did not tell the cashier that he was asking on behalf of any party to the note; it did not appear that the cashier examined the file of notes, or any of the books of the bank. But he answered that it had been paid. In truth it had never been paid, and at that moment still lay among the uncancelled notes of the bank. Upon the strength of the principles above propounded, the court held that the bank was not bound by this statement of its cashier, and this even though it was shown that a surety on the note, relying on that statement, had given up security which he held from the principal promisor. The surety had taken imperfect means to acquire the knowledge he desired, and his loss was only a natural result of his insufficient thoroughness in the transaction. The opinion delivered by Shepley, C. J., is learned and able, but two members of the bench found reasons for dissenting from the decision of their comrades.

In any suit between the bank and that surety on that note, the plain principles of justice would estop the bank, and make it responsible for all loss occasioned to the surety by such a representation. The cashier has charge of the collection of notes; he receives payments; and on what could the surety rely, or any person having dealings with a bank, if not on such a declaration

[8] 2 Hill (N. Y.) 445.

[9] 10 Ves. 123. To the same point, see Lime Rock Bank *v.* Hewett, 52 Me. 531.

as this? The following cases seem far nearer the true doctrine. See also Certification.

In Nebraska it has been held that, where a surety on a note is erroneously told by the cashier at the bank that the note has been paid, and upon the strength of this statement becomes surety upon another note of the same maker, the bank will not be able to recover on this second note. It does not appear in this case that the cashier knew the precise object with which the inquiries were made; but he obviously had reason to suppose that they were not made altogether idly, or without purpose.[10]

Representation as to Payment of Note may Bind Bank, even though the Officer had an Adverse Interest, if this is Unknown to the Third Party

(*d*) The bank must answer for loss resulting from declarations of its cashier to an indorsee as to payment of a note held by the bank, and the fact that the cashier was also an indorser does not alter the case. The cashier's declarations in the business of the bank and pertinent to it are admissible against it. The bank claimed that, as the cashier was an indorser, his interest was adverse to that of the bank, and therefore his representations did not bind it; but the court said that releasing an indorser by his statement was exactly contrary to his own interest as an indorser, as it destroyed his right of contribution from such person, and, even if his interest were antagonistic to that of the bank in the matter, the bank would still have been liable; for the directors knew, or were bound to know, who were the parties on the note, and if they allowed the cashier to stand where he had an interest to, and where he could and did, cause loss by false statements about the note, it would seem no reason to throw the loss on the innocent misled indorser.[11]

Representations aside from the Cashier's Scope of Duty

(*f*) The cashier wrote to the Secretary of the Treasury that the bearer was authorized to contract for the transfer of money; such a contract was beyond the scope of a cashier's office, and therefore

[10] Merchants' Bank *v.* Rudolf, 5 Neb. 527.
[11] Grant *v.* Cropsey, 8 Neb. 205 (1879).

his representations did not bind the bank, and it did not have to make good the money advanced to the "bearer." [12]

A., the cashier of a bank, was asked by C. about the solvency of a certain firm, F.; he replied favorably. C. bought large amounts of the bills and acceptances of F. F. failed, and C. sued A. and the bank. The court said that the bank could not be held, for it was no part of the cashier's business to give such information; and the cashier was not liable, for it was only the statement of honest opinion, and not a guaranty.[13]

§ 168. **Of Limitations of Time and Place upon the Cashier's Powers.** — The place where and the time when a cashier is called upon to do, or undertakes to do, acts on behalf of the bank, are often circumstances materially affecting his powers in the premises. For some purposes he is clothed with his official character only at the banking-house and in banking hours; for other purposes he remains clothed with it at all times and places. No better rule for discriminating between these two classes presents itself than to say, that, as there are some acts which can only be properly performed at the office of the corporation and during the hours ordinarily devoted to public business, so there are other matters which may be transacted equally well at all times and places. The distinction is a purely practical one, arising from the intrinsic character of the transaction itself regarded from a business point of view.

The Test

(*a*) A test, which is perhaps as accurate as any that could be suggested, is furnished by the question whether for the due performance of the business there are requisite any knowledge or appliances which can only be satisfactorily and fully possessed by the cashier when he is at the banking-rooms. It is easy to

[12] U. S. *v.* City Bank, 21 How. 356, 16 L. ed. 130.

A promise by a cashier of a bank made, without consideration to the drawer of a draft, to pay the same out of the funds of a customer on whom the draft is drawn and who has been credited with the proceeds of negotiable paper which he, as owner, transferred to the bank, is not enforceable against the bank unless the customer assents that the bank shall make an application of the funds so placed to his credit. Ballard Bros. *v.* Bank of Madison, 121 Ga. 527, 49 S. E. 615 (1904).

[13] Horrigan *v.* First National Bank, 10 Chic. Leg. News 112 (Tenn.); Crawford *v.* Boston Store Mercantile Co., 67 Mo. App. 39; Hadden *v.* Dooley, 92 Fed. 274 (1899); First National Bank *v.* Marshall Bank, 82 Fed. 725 (1897); Taylor *v.* Commercial Bank, 174 N. Y. 181, 66 N. E. 726, 95 Am. St. Rep. 564 (1903).

point this rule with examples which will be serviceable in illustrating its precise significance.

May Draw Checks away from Bank

(*b*) Thus it cannot be pretended that any sound reason could restrict the power of the cashier to draw checks to a power to draw and sign them only in the office of his own bank and in the ordinary business hours. Even prudence might sometimes induce him to draw them elsewhere, as at the rooms of the drawee bank, to avoid danger of loss or fraud.

Indorsement away from Bank Held Good

(*c*) So an indorsement may be made away from the bank. Irwin, cashier of a bank, was asked to discount a draft payable to his bank. He could not, so M., the cashier of another bank, at the request of Irwin, discounted the bill on the street, Irwin indorsing it. Irwin's bank was held by the indorsement.[1]

Cashier may Receive Notice away from Bank, but may not give Information, as a Rule, Elsewhere

So, if any person wishes to impart information so as to warn the bank or to affect it with notice, it would be absurd to say that he could do so effectually only if he should make his communication to the cashier actually within the walls of the banking-house, and before it was closed to the public for the day. There would be no reason in such restrictions, and there is no law in their support. But if information be sought from the cashier, it should be sought at the banking-rooms, where he can have access to the books, papers, and records.[2]

May Pay or Certify Checks

(*d*) But, on the other hand, it is obvious that a cashier ought not to make a payment upon, or to certify or accept, a check or draft when he is away from the bank. He may have been absent from the bank but very few minutes, and it may be that the check, if presented when he left, would have been properly paid or certified or accepted. Still, even in that short interval, the drawer's account may have undergone so material a change by reason of

[1] § 168. Bissell *v.* First National Bank of Franklin, 69 Pa. St. 415.
[2] Merchants' Bank *v.* Rudolf, 5 Neb. 527.

payments made or drafts accepted on his account, or perhaps by force of garnishee process served upon his funds in the bank, that his checks could no longer be honored. In that case the payment, certification, or acceptance having been wrongfully made by the cashier, would become his own individual loss, and he would be obliged to reimburse the amount to the bank, if the bank should see fit to accept and ratify, instead of repudiating, the proceeding. Clearly the same must also be the case if later in actual time than the payment, certification, or acceptance by the cashier, but still prior to his return to the bank and entering or noting the transaction to the debit of the drawer, or informing the proper officers of its having been made, any other disposition had been legally made of, or any other valid lien had attached upon, the drawer's funds or credit. Otherwise a loss would be inflicted upon the bank solely and wholly by reason of improper conduct on the part of its officer. In fact, it may fairly be argued that, in the supposed case of the payment made in this manner, the cashier practically renders himself the agent of the drawer for the presentment and collection of the check; and, in expectation that when he can arrive at the bank and present it there will be no obstacle to its full payment, he ventures to advance upon it to the drawer its full face value. The risk of intermediate transactions diminishing or destroying the security is his own private risk; the loss, if any, is his own private loss. The same reasons might make the certification or acceptance binding against him personally. His acceptance thus made on behalf of the bank can be repudiated absolutely by the bank, if events transpiring before his return to the office and entry or report of the transaction would render the making of the acceptance at the time of the return and entry or report improper. This would at least be the case so long as the acceptance remained in the hands of the party obtaining it, or of any other party having notice of the circumstances attendant upon its making, for these persons would be affected with a presumed knowledge of the rule of law rendering this undertaking of the cashier irregular.[3]

Bona Fide Holder can Hold the Bank

(*e*) But since the instrument would probably be perfectly regular on its face as the acceptance of the bank, and would in fact have

[3] Bullard *v.* Randall, 1 Gray (Mass.) 605. The opinion in this case was delivered by Chief Justice Shaw, and has always been relied upon as a thoroughly satisfactory and conclusive authority.

been executed and issued solely through the improper exercise of a power really lodged in the officer of the bank, a *bona fide* holder for value and without notice would be allowed to enforce it against the corporation.[3a] Whether the bank could be held by the acceptance, if the cashier on his return failed to report it, the drawer having then funds enough, is a difficult question. It cannot be said, that, in making the acceptance, as in making the payment, the cashier assumed a position in any degree resembling that of an agent for the holder. On the contrary, his act assumed to be and could be throughout only purely official. Upon his return to the bank it was his duty to report it and have it duly entered. This must perhaps be regarded as his official duty. Accordingly, it may be argued that his neglect of it would leave the bank still bound to the third party, though entitled to hold the cashier liable to make good any damage to itself. On the other hand, this position can be assailed by urging that the transaction was from the outset void as an undertaking of the bank, or, if not actually void, yet so far irregular and invalid as against the bank that it can be made good against it only by a thorough reperformance in full of all essential acts. The party dealing with the cashier may well be held to take the risk of the cashier's faithful conduct in these particulars; which the bank cannot possibly be regarded as warranting, since the whole proceeding, *ab initio*, was directly in contravention of the principles of the agency which it had established.

Deposits must be Received at the Bank. Until actually Put in Bank's Possession, the Cashier is Agent of the Depositor

(*f*) An interesting and important question, similar, but not quite identical, is raised where the cashier receives payments of money for credit on an ordinary deposit account, when he is away from the bank. This limitation is annexed to the simple word "payment", because perhaps the case of receiving payment of a debt due to the bank might be different. In many cases the law requires the creditor to make demand upon his debtor. And unquestionably a cashier may follow up a delinquent or doubtful debtor of the bank, and exact payment from him at any time and place when and where he may be able to do so. But where money is offered for credit on a deposit account it is clear that it should

[3a] See *Ultra vires*, § 722.

not be accepted away from the bank. The bank does not contemplate any such method of receiving deposits, but has provided an entirely different system. Clearly, therefore, it does not empower its cashier thus to receive them. He cannot bring them instantly to account in the bank, nor secure them with the safeguards always provided in banks for the preservation of their funds. But if he does so receive them, and then loses or misapplies them before he has actually transferred them into the corporate possession, the question arises, Can the payer hold the bank to make good the amount? Clearly, we say, he cannot. Even though the cashier may have had the identical money in his pocket at and after the time of his return to the bank, nothing short of his actual transfer over and bringing it to account in the bank can make the bank liable. The transaction, even in this form, differs materially from the case of an acceptance or certification previously supposed. In that case the cashier was acting strictly as an agent of the bank. He could possibly do the act in no other capacity. Whereas in taking the money it must be held that he was acting as agent for the party paying it; the trust and object of his agency being that he should make the payment into the bank to the credit of the payer's deposit account. He was the agent of the payer for this purpose, selected as a convenient agent because he was also an agent of the bank. The money was paid to him doubtless *because* he was cashier, but it was not paid to him *as* cashier. The latter character could not be given to the transaction, even if both parties sought to do so; for they must both be affected with knowledge of the rule of law which renders a payment made under such circumstances irregular and improper, and so invalid as against the bank. It is fair then to say that in no part of the transaction can it be admitted that the cashier was acting officially, even though irregularly so. His act should be regarded, not as irregularly official, but as absolutely unofficial. Therefore the obligation which he owed to pay the money into the bank ran to the party paying it to him for that purpose, not to the bank; his breach of it would make him liable to that party, not to the bank; the loss arising from the breach must be borne by that party, who was in fact his principal in the agency, not by the bank, which was known to all concerned to have strictly excluded any such function from the scope of his official agency.

The three instances adduced differ very considerably in the force of the arguments which can be brought to make them respec-

tively acts upon which a liability of the bank can be based. But it seems that in all alike the non-liability of the bank is undeniable. Though the cashier ought on his return to the bank to report the acceptance he has made on its behalf, or to pay over the money he has received on its behalf, and though, if he should then promptly report and enter the acceptance, the drawer's account might make it good; or though he may have the identical funds paid over to him still in his pocket; yet in both cases it is clear that the person dealing with him knew, or was at law bound to know, that the dealing was, under the circumstances, irregular, improper, and beyond the scope of the cashier's agency. The transaction might be capable of being made right in the future, when the cashier should return to the bank. But until that time, and until, as a matter of strict fact, it had actually been so made right, it must be invalid as against the bank. That it should not be made right at all is a chance which may come to pass, either through the mistake, the negligence, the innocent loss, or the fraud of the cashier. Now clearly the third party takes the chance of the mistake or the loss, and why not equally of the negligence and the fraud? He trusts that everything will go right, that the cashier will be careful and honest. But the sufficiency of both the care and the honesty is his own risk; for he has confided in them of his own independent motion, not under the invitation or holding out of the bank, but in fact with the express knowledge, either actual or conclusively inferred at law, that the bank warrants neither when they are relied upon under such circumstances.[3b]

Bank may Adopt Cashier's Act away from Bank

(*g*) The decision in Pendleton *v.* The Bank of Kentucky [4] does not at all interfere with the above doctrine. The court certainly remark in that case that the cashier holds his office at every time and place. But the point of view from which they make that remark explains its intended significance. They were discussing the question of whether the cashier's conversion of money improperly received by him when away from the bank was a default which would sustain a suit upon his official bond, and it was in the course of declaring that it would, that they made the above remark. It

[3b] Quoted in Demarest *v.* Holdeman, 34 Ind. App. 685, 73 N. E. 714 (1904).

[4] 1 T. B. Monr. (Ky.) 171.

cannot be questioned that, if the bank has waived the irregularity, and adopted or ratified the improper act, if it has fulfilled the obligation which its agent attempted to impose upon it, it has done simply what it had a right to do, and what neither the officer nor his sureties can object to. There is nothing originally void about the act, nothing which prevents the bank from subsequently accepting and ratifying it. It is unauthorized and therefore voidable, but it is no more than this. On the other hand, if the bank exercises its privilege of repudiating the transaction, the right of action against its cashier cannot accrue to it, for it cannot be allowed to take the two inconsistent positions of repudiating the responsibility, and yet claiming damages for a loss which it could only suffer if it were responsible.

A Representation away from Bank may Bind

(*h*) Where a cashier had wrongfully indorsed a note "G. B., Cas.", and inquiry was made from him at a distance from the bank concerning the note, and he replied that it was "all right", the court said that the force and effect of this statement, as against the bank, were nowise affected by the consideration of the place where the conversation took place.[5] The element of place was evidently, under the especial circumstances, of no consequence whatsoever. An inquiry and reply as to any other note, where the cashier might be supposed to speak from memory and without access to the books, papers, and memoranda of the bank, might not improbably be differently regarded.

§ 169. **No Power.** — *Cannot Pledge Bank's Property for Antecedent Debt.* Though the cashier may dispose of the bank's negotiable securities in the regular course of business, he cannot pledge its assets for the payment of an antecedent debt.[1]

Nor has the cashier power to bind the bank to pay a draft, to be drawn on a future day by a third person on one of its customers,

[5] Houghton *v.* First National Bank of Elkhorn, 26 Wis. 663. See Kennedy *v.* Otoe County National Bank, 7 Neb. 59.

[1] § 169. State of Tennessee *v.* Davis, 50 How. (N. Y.) 447; Montgomery Bank *v.* Walker, 181 Ala. 368, 61 So. 951 (1913); Dycus *v.* Traders' Bank, 52 Tex. Civ. App. 175, 113 S. W. 329 (1908). Cashier cannot give mortgages on the bank's property or transfer its assets, 95 Miss. 742, 50 So. 65, 1912A Ann. Cas. 93, n.; nor assign the assets of the bank for the benefit of a part of the creditors to the exclusion of others. Ledger-Wood *v.* Dashiell, 177 S. W. 1010 (Tex. Civ. App.) (1915).

even where the bank expects to have a deposit from the customer sufficient to cover the draft.[1a]

Agreement to Indemnify Sheriff

Where a claim of the bank has been pushed to judgment and execution, the cashier delivering the execution to the sheriff to levy has not authority to bind the bank by any undertaking to indemnify the officer. His agreement to this effect, though purporting to be made by him in his official capacity, will be invalid as against the bank, though it may operate to hold him personally.[2]

It has been said that the cashier has charge of all promissory notes due to the bank. But though he thus has actual manual possession and control of them, yet he has not that legal possession which will enable him to bring a suit upon them in his own name. His possession is in fact only custody which the court will not recognize as an absolute, but only as a qualified possession, not carrying with it the presumption of title or the right to sue.[3]

A cashier cannot *virtute officii* release a surety upon a note held by the bank, even though the bank holds other security to which it might resort. Special authority is necessary to justify such release.[4]

A cashier cannot *virtute officii* bind the bank by representations as to the solvency of a customer.[4o] Nor has he authority to release the maker [4oa] or indorser.[4ob]

A purchase of boots and shoes in the name of a bank, by its

[1a] Flannagan *v.* California National Bank, 56 Fed. 959.

[2] Watson *v.* Bennett, 12 Barb. (N. Y.) 196.

[3] Olcott *v.* Rathbone, 5 Wend. (N. Y.) 490.

[4] Merchants' Bank *v.* Rudolf, 5 Neb. 527; Cocheco National Bank *v.* Haskell, 51 N. H. 116; Daviess County Savings Ass. *v.* Sailor, 63 Mo. 24 (1876); Gray *v.* Farmers' Bank, 81 Md. 631, 32 Atl. 518; Hilliard *v.* Lyons, 180 Fed. 685 (1910); First National Bank *v.* Lowther-Kaufman Oil etc. Co., 66 W. Va. 505, 66 S. E. 713, 28 L. R. A. (N. S.) 511 (1910).

The cashier of a national bank which holds the paper of a firm of which the cashier is a member, has no power to bind the bank by an agreement that there shall be no liability upon an accommodation note procured by him to be substituted, for a special purpose, for the indebtedness of his firm. Allen *v.* First National Bank, 127 Pa. St. 51, 17 Atl. 886.

[4o] Taylor *v.* Commercial Bank, 174 N. Y. 181, 66 N. E. 726, 95 Am. St. Rep. 564 (1903).

[4oa] First National Bank *v.* Lennon, 170 N. C. 10, 86 S. E. 715 (1915); Ravenswood Bank *v.* Wetzel, 58 W. Va. 1, 50 S. E. 886, 70 L. R. A. 305 (1905); Gillis *v.* First National Bank, 148 Pac. 994 (1915) (Okla.); Packers' National Bank *v.* Rushart, 98 Neb. 354, 152 N. W. 789 (1915).

[4ob] Farmers' etc. Bank *v.* Clancy, 163 Mich. 586, 128 N. W. 752 (1910)

cashier and general manager for the benefit of a third person, will not make the bank liable for the amount of the purchase, in the absence of its knowledge, at the time of purchase or subsequent ratification.[4a]

In Missouri a cashier is prohibited by statute from indorsing a note without *first* having been authorized by the board of directors to do so, and the cashier's indorsement without such permission is void.[4b] But the statute is for the protection of the bank against the acts of the cashier and an indorsement of a note in blank by the cashier in his settlement with the bank, known and assented to by the bank, cannot be questioned by the cashier.[4c]

A cashier even though he is the manager or executive officer of a bank has no authority to release the claims of the bank, or to pay a check or deposit when the bank is notoriously insolvent and the check is drawn by the assignee for the purpose of thwarting claims for liens.[4d]

A cashier cannot delegate to an officer of another bank authority to certify checks in such cashier's name.[4e]

The cashier of a bank has no authority to make any false representations on behalf of the bank as to the solvency of a customer who is one of its debtors.[4f]

The cashier cannot make a deed to himself, and in the absence of evidence of authority to do so such deed is presumptively void.[4g]

The cashier has no power or apparent authority to obligate the bank as surety on a replevin undertaking in an action between third parties in which the bank to all outward appearances has no interest.[4h]

A cashier has no authority to agree to receive anything but

[4a] U. S. Boot and Shoe Co. *v.* Stebbins, 2 S. D. 74, 48 S. W. 833 (1891).

[4b] Long *v.* Long, 167 Mo. App. 79, 150 S. W. 1135 (1912); Miles *v.* Macon County Bank, 187 Mo. App. 230, 173 S. W. 713 (1914); Musgrove *v.* Macon County Bank, 187 Mo. App. 483, 174 S. W. 171 (1915).

[4c] Cantrell *v.* Davidson, 180 Mo. App. 410, 168 S. W. 271 (1914).

[4d] Ellis *v.* First National Bank, 22 R. I. 565, 48 Atl. 936 (1901).

[4e] United States National Bank *v.* First etc. Savings Bank, 60 Or. 266, 119 Pac. 343 (1911).

[4f] Taylor *v.* Commercial Bank, 174 N. Y. 181, 66 N. E. 726, 62 L. R. A. 783, 95 Am. St. Rep. 564 (1903); reversing 68 App. Div. 458, 73 N. Y. S. 924.

[4g] Northwestern etc. Ins. Co. *v.* Lough, 13 N. D. 601, 102 N. W. 160 (1904).

[4h] Sturdevant Bros. *v.* Farmers' etc. Bank, 69 Neb. 220, 95 N. W. 819 (1903).

money in payment of a non-negotiable promissory note indorsed to it.[4i]

A cashier has no implied authority by virtue of his office to extend the time of payment of a note without the knowledge or consent of the bank when the effect would be the release of a surety.[4j] In Kansas, however, such authority is assumed, where additional security is taken.[4k]

A cashier cannot lease property of the bank, or lease premises of others for the bank, or accept the surrender of a leasehold term.[4l]

No Inherent Power to Buy or Sell Realty for Bank

(*a*) A bank is not bound by the cashier's contract with a broker for sale or purchase of real estate, unless previous authority be shown, or unless estopped by a line of conduct recognizing such acts.[5]

No Power to Indorse Bank's Name on Own Paper

The cashier of a bank is not, by reason of his official position, presumed to have the power to bind it as an *accommodation indorser* on his individual note; and the payee who fails to prove that the cashier, as such, had authority to make the indorsement, cannot recover against the bank. The very form of the paper carries notice to a purchaser of a possible want of authority to make the indorsement, sufficient to put him on his inquiry.[6]

A cashier has no right or authority as such to loan to himself as an individual, or to use in any manner for himself the funds of the bank. Such a loan can only be sustained by showing express

[4i] First National Bank *v.* Alexander, 152 Ala. 585, 44 So. 866 (1907).

[4j] Vandeford *v.* Farmers' etc. Bank, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129, n. (1907). But see Wakefield Bank *v.* Truesdale, 55 Barb. (N. Y.) 602.

[4k] First National Bank *v.* Livermore, 90 Kan. 395, 133 Pac. 734, 47 L. R. A. (N. S.) 274, n. (1913).

[4l] People's Bank *v.* Bennett, 159 Mo. App. 1, 139 S. W. 219 (1911).

[5] Winsor *v.* Lafayette County Bank, 18 Mo. App. 665; Spongberg *v.* First National Bank, 18 Idaho 524, 110 Pac. 716, 1912A Ann. Cas. 95, n. Nor is a bank whose charter provides that its business shall be managed by the directors bound by the cashier's act of changing a lease executed by the bank. Dycus *v.* Traders' Bank, 52 Tex. Civ. App. 175, 113 S. W. 329 (1908); People's Bank *v.* Bennett, 159 Mo. App. 1, 139 S. W. 219 (1911).

[6] West St. Louis Savings Bank *v.* Shawnee Co. Bank, 95 U. S. 557, 24 L. ed. 490 (1877); State National Bank *v.* Newton National Bank, 66 Fed. 691.

authority or ratification.[7] It is immaterial that the cashier is a partner and manager of the bank.[7a]

Of course if the bank has no authority through its directors to make a contract, the cashier can have no such authority.[7b]

Where the cashier, acting for the bank, discounts an accommodation note he has no authority to induce the payee to apply the proceeds of the note to the payment of premiums in a certain insurance company in which the cashier has an interest, and such act of the cashier is no defence to the note in the hands of the bank.[8]

[7] Iowa State Bank *v.* Black, 91 Iowa 490, 59 N. W. 283; Wallace *v.* Lincoln Savings Bank, 89 Tenn. 646, 15 S. W. 448 (1890); Barth *v.* Koetting, 99 Wis. 242, 75 N. W. 395 (1898); St. Charles Savings Bank *v.* Orthweim Investment Co., 160 Mo. App. 369, 140 S. W. 921 (1911); Iron City National Bank *v.* Fifth National Bank, 31 Tex. Civ. App. 308, 71 S. W. 612 (1903); Campbell *v.* Upton, 66 App. Div. 434 (1901), 73 N. Y. S. 1084; Campbell *v.* Manufacturers' National Bank, 67 N. J. L. 301, 51 Atl. 497, 91 Am. St. Rep. 438 (1902); McGregor *v.* Witham, 126 Ga. 707, 56 S. E. 55 (1906); Langlois *v.* Gragnon, 123 La. 453, 49 So. 18, 22 L. R. A. (N. S.) 414 (1909); Home Savings Bank *v.* Otterbach, 135 Iowa 157, 112 N. W. 769, 124 Am. St. Rep. 267 (1907); Berens *v.* Poetker, 175 Ind. 504, 92 N. E. 339 (1910); Mentz's Assignee *v.* Mahoney, 150 Ky. 409, 150 S. W. 503 (1912); German Savings Bank *v.* Des Moines National Bank, 122 Iowa 737, 98 N. W. 606 (1904); St. Charles Savings Bank *v.* Edwards, 243 Mo. 553, 147 S. W. 978 (1912); Supreme Tent Knights *v.* Port Huron Savings Bank, 137 Mich. 627, 100 N. W. 898, 109 Am. St. Rep. 690 (1904); Hier *v.* Miller, 68 Kan. 258, 75 Pac. 77, 63 L. R. A. (N. S.) 952 (1904); Cobe *v.* Coughlin Hardware Co., 83 Kan. 522, 111 Pac. 458, 31 L. R. A. (N. S.) 1126, n. (1910); Mendel *v.* Boyd, 71 Neb. 657, 99 N. W. 493 (1904); Kitchens *v.* Teasdale Com. Co., 105 Mo. App. 463, 79 S. W. 1177 (1904); State *v.* Miller, 47 Or. 562, 85 Pac. 81, 6 L. R. A. (N. S.) 365, n. (1906); Davenport *v.* Walker, 132 App. Div. 96, (1909) 116 N. Y. S. 411; Campbell *v.* National Broadway Bank, 130 Fed. 699 (1904).

But when a cashier who has power to sign drafts drawn in behalf of the bank on a correspondent and is allowed to obtain drafts for his own use and to overdraw his personal account, pays for property purchased by him with a draft fraudulently drawn upon the correspondent bank payable to the order of the vendor the bank is not entitled to recover the same from the payee of the draft even though the cashier paid nothing for the draft. Campbell *v.* Upton, 66 App. Div. 590 (1901), 73 N. Y. S. 1084.

[7a] Blake *v.* Third National Bank, 219 Mo. 644, 118 S. W. 641 (1909).

[7b] Swindell *v.* Bainbridge State Bank, 3 Ga. App. 364, 60 S. E. 13 (1907).

[8] Moreland's Assignee *v.* Citizens' Savings Bank, 97 Ky. 211, 30 S. W. 637 (1895).

When a cashier of a bank presents to his own institution for discount, before maturity, a note made by himself and indorsed by the payee, and the payee and indorser is a depositor of the bank who has been in the

§ 170. **Instruments executed in Form to the Cashier.** — *Intent of the parties governs.* The converse of those cases in which third parties seek to hold the bank upon the signature of the cashier is to be found in those cases in which the bank seeks to hold third parties liable to itself upon instruments running nominally to the cashier. Here the general rule is simple enough. If, in fact, the contemporaneous intent and understanding at the time of entering into the contract or obligation was that it ran from the third person to the bank, or to the cashier on behalf of the bank, or to him in his official character, then the bank is entitled to the performance and benefit thereof, and may enforce this right at law precisely as if it were corporately named as the party in the transaction, instead of only its cashier. That words are added to the name of the cashier, more or less fully descriptive of his office, is a circumstance which is properly adduced in evidence to prove the fact of intent and understanding; and though it cannot perhaps be said that the addition of such words is absolutely conclusive of the corporate character of the transaction, since a cashier might be described as such for purposes of identification, yet it is clearly very strong evidence to this effect, and might perhaps, if nothing repugnant appeared in the rest of the transaction, be regarded as making out a *prima facie* case of a corporate dealing. Thus, a bill or note indorsed over to, or made payable to, "A. B., Cashier", may be sued upon by the bank in its corporate name and capacity, and the defect in the description in failing to name the bank of which he is cashier may be supplied by parol evidence of that fact.[1]

habit of doing business with it, the possession of the note by the cashier raises no presumption that he is the owner of the paper, but rather that it has been handed to him for the purpose of discount for the depositor's credit. First National Bank *v.* Gerli, 232 Pa. St. 465, 81 Atl. 540 (1911).

[1] § 170. Stamford Bank *v.* Ferris, 17 Conn. 259; Barney *v.* Newcomb, 9 Cush. (Mass.) 46; Wright *v.* Boyd, 3 Barb. (N. Y.) 523; Johnson *v.* Catlin, 1 Williams (Vt.) 87; Erwin *v.* Branch Bank at Mobile, 14 Ala. 307; Baldwin *v.* Bank of Newbury, 1 Wall. 234, 17 L. ed. 534. We cannot do better than refer the reader especially to the opinion in the last-named case. It is conclusive of the whole question; and its array and discussion of the authorities are exhaustive. See also Nave *v.* Hadley, 74 Ind. 155 (1881); Darby *v.* Berney National Bank, 97 Ala. 643, 11 So. 881 (1892); Alston *v.* Heartman, 2 Ala. 699; Hazard *v.* Planters and Merchants' Bank, 2 Ala. 299; Hobbs *v.* Chemical National Bank, 97 Ga. 524, 25 S. E. 348 (1895); First National Bank *v.* Johnson, 133 Mich. 700, 95 N. W. 975, 103 Am. St. Rep. 468 (1903); Eades *v.* Muhlenberg Co. Savings Bank, 157 Ky. 416, 163 S. W. 494 (1914).

A note payable to "Wes. Lane, Cashier First National Bank of Lebanon", is payable to the bank, and the bank can maintain suit thereon

Contract in Cashier's Name, Bank Held

A bank ordered goods for C., who was unable to pay at the time; the cashier took C.'s paper and sent the vendor a certificate of deposit signed in his own name alone, and not as cashier. *Held*, that this was in the ordinary course of business; the cashier did not exceed his authority and the bank was liable.[2]

A bond of a bank as depositary of county funds, in which "H., cashier of M. Bank", is named as principal, which is signed "H., cashier", and in which the bank is referred to as the "above bounden, the M. Bank", is the bond of the bank as principal.[3]

§ 171. **When the Cashier binds the Bank.**[0] — We speak here only of obligations in the nature of contract.

(*a*) Those acts which constitute the ordinary and customary functions of cashiers, and which he has inherent power to do, bind the bank as its own acts in favor of any person dealing with the bank and having no notice of any restriction upon the cashier.

in its own name without indorsement. Nave *v.* First National Bank of Lebanon, 87 Ind. 204 (1882).

But a deed of real estate to "E. H. Pullen, Vice President of the National Bank of the Republic of the city of New York" is a deed to E. H. Pullen in his individual capacity and the power of sale in the deed cannot be exercised by the cashier. Greenfield *v.* Stout, 122 Ga. 303, 50 S. E. 111 (1905).

In Iowa, by statute, when an instrument is drawn or indorsed to a person as "cashier" of a bank it is deemed *prima facie* payable to the bank and a *bona fide* holder of a certificate of deposit made out to L. Cashier and indorsed by S. as cashier may show that S. was the cashier of the bank and so recover from the bank. Johnson *v.* Buffalo Center Bank, 134 Iowa 731, 112 N. W. 165 (1907).

[2] Crystal Plate Glass Co. *v.* First National Bank, 6 Mont. 303, 12 Pac. 678.

Whether evidence can be introduced to show a usage to transfer to the cashier with the design that the transfer shall operate in fact as a transfer for the use of the bank, must be regarded as still unsettled. If introduced, it would be for the purpose not of varying the contract, but of interpreting it: not of controlling any rule of law, but of explaining the intention of the parties. On this ground it has been held admissible in Connecticut, but by a divided court. Stamford Bank *v.* Ferris, 17 Conn. 259. In Massachusetts a contrary opinion was intimated, though not directly laid down. New England Mar. Ins. Co. *v.* Chandler, 16 Mass. 275, 278 (per Parker, C. J.).

[3] Board of County Commissioners *v.* Manufacturers' Bank, 69 Minn. 421, 72 N. W. 701 (1897).

[0] § 171. There is no reason which is founded on principle that can be given for not applying the same rule of agency to a cashier as to other persons occupying fiduciary relations. Campbell *v.* Manufacturers' National Bank, 67 N. J. L. 301, 51 Atl. 497, 91 Am. St. Rep. 438 (1902).

(*b*) Acts beyond this line of inherent power are the acts of the bank only by reason of express authority given by the organic law, the stockholders, or the board of directors, or *by reason of the conduct of the bank or its management*, in allowing the cashier to continue an open course of conduct without objection, or receiving the benefits of his act with knowledge of the facts, or otherwise ratifying his doings.

This distinction should be kept ever in mind; it is not the act of the agent that can give him authority, it must arise by actual gift of his principal, or the *conduct of the principal* must be such as to base a proper inference, such as a prudent business man would draw, that the agent acts with the approval of the bank.

(*c*) But when upon this principle it is decided that, as between the bank and the third party, C., the act is that of the bank, and not the cashier's individual act, the further question arises, Is the bank bound? It does not follow, because an act is that of the bank, that it is necessarily bound by it, for, like an infant, a bank is incompetent to do some acts, and some contracts are utterly void, no matter who makes them, as those that are immoral or against public policy.

If the act is that of the bank and *intra vires*, *i.e.* such as the bank has power to do, and is in proper form, it is binding.[0a]

[0a] A cashier has at least *prima facie* authority to extend the time of payment of the bank's negotiable paper, and it is immaterial that he spent the greater part of his time in another city, especially where he kept in communication with the bank directing its most important affairs; and an instruction that a cashier could not release the principal on a note and accept another in his place was declared to be erroneous under the facts in evidence. Citizens' Bank *v.* Douglass, 178 Mo. App. 664, 161 S. W. 601 (1913). First National Bank *v.* Greenville Oil etc. Co., 24 Tex. Civ. App. 645, 60 S. W. 828 (1901).

A cashier has authority to receive notes and make collections thereon, and the bank is responsible when moneys so received are stolen or embezzled by its cashier or other officer. Lemon *v.* Sigourney Savings Bank, 131 Iowa 79, 108 N. W. 104 (1906).

A cashier is empowered to draw on the bank's funds and if by a false check he convert to his own use money on deposit, the bank must suffer the loss. First National Bank *v.* Peck, 180 Ind. 649, 103 N. E. 643 (1913).

If a depositor, who is about to draw his money from a bank and deposit it in a certain trust company, is induced by the cashier to deposit it in another trust company and he executes a check in the form of a receipt and delivers it to the cashier with instructions to deposit the amount named with the trust company suggested, and the cashier makes no remittance but uses the draft to cover up his embezzlement the bank is liable for the amount of the check. Goshorn *v.* People's National Bank, 32 Ind. App. 428, 69 N. E. 185 (1902).

But if the transaction, though that of the bank under the above principles, is informal, or is *ultra vires, i.e.* an act beyond its charter powers and their incidents, the bank may or may not be bound. See § 722.

If the act is not that of the bank, and is not ratified or adopted by the bank, it is not bound. For example, if a loan is contracted by the cashier in such a manner that it does not bind the bank, it cannot be considered that the mere circumstance of his turning the money into the mass of the bank funds, and allowing it to remain there, and to be used as part of the floating assets, will suffice to render the bank liable upon it as a corporate debt. The fact and nature of the transaction must in some way be brought sufficiently home to the official knowledge of the directors, so that their failure to repudiate and undo it must be construed to amount to an acceptance and ratification of it on behalf of the corporation.[1] We will now notice the cases on these points.

Certain Inherent Powers and Duties

(*d*) There are certain functions which it is the duty of a cashier to perform, and certain acts which he has the right to do on behalf of the bank, simply by virtue of his induction into the office. They are inherent in it, and taken together they constitute the component parts which go to make it up. Others may be added, but these are essential. Publicly to call a person by the title of cashier is to invest him with the power, as towards the public, of binding the bank by his action in pursuance or fulfilment of any and all these inherent powers and duties. It is in fact a declaration of his agency. If the bank nominates and holds out A. B. as its "cashier", it in effect says to the world that A. B. is duly authorized to transact on its behalf all business which judicial decisions or banking usages have rendered inherent functions of the office designated by this name. Any act done by him within this scope and on behalf of the bank is the act of the bank.[2]

It would seem almost a work of supererogation to make this statement, but we have been led to do so by noticing in the argument made lately by very eminent counsel in an important case,

[1] Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120.

If a cashier appropriates to his own use a gratuitous special deposit in the bank the bank is not chargeable with the loss. Sherwood *v.* Home Savings Bank, 131 Iowa 528, 109 N. W. 9 (1906).

[2] Burnham *v.* Webster, 19 Me. 232.

that where the bank charter or the general banking act under which the corporation was established gave to the directors the power to define or limit or prescribe the powers and duties of the cashier, their neglect so to do left the cashier without either powers or duties. The position is novel, perhaps ingenious, but certainly utterly untenable, and has since been so held by the court.[3] The conference upon any person of the name and official position of cashier carries with it, by a necessary and a strictly legal implication, certain duties and certain powers, towards both the bank and the public, of the nature above described. Again and again has this fact been recognized in judicial decisions, equally where the directors were and where they were not endowed by the law originating the corporate being with authority to define or prescribe the powers and duties of the officers; equally where they had and where they had not undertaken to exercise this authority. These are the functions ordinarily appurtenant to the office itself. They in no case require to have their existence affirmatively established, but, on the other hand, demand strong negative testimony to controvert the legal presumption of their universal force. The great bulk of the cases which will be cited in illustration of the present topic proceed upon the tacit recognition of this doctrine; but in the foot-note are cited a few of those wherein the language more distinctly asserts it.[4] In the case of The United States *v.* The City Bank of Columbus, Mr. Justice Wayne said that, "though the directors had power under the act of incorporation to fix the duties of the cashier, and though whether they had done so or not did not appear", yet "the acts of the cashier done in the ordinary course of the business actually confided to *such an officer* may well be deemed *prima facie* evidence that they fell within the scope of his duty." As a matter of fact, directors seem seldom to have cared to draw up regulations for the government of their cashiers, and when they have done so their regulations have been so general in phraseology, or have so accurately followed the principles which the law itself lays down in the absence of such directorial action, that they appear seldom, if ever, to have affected the decision in

[3] Merchants' Bank *v.* State Bank, 10 Wall. 604, 19 L. ed. 1008.

[4] Sturges *v.* Bank of Circleville, 11 Ohio St. 153; Minor *v.* Mechanics' Bank of Alexandria, 1 Pet. 46, 7 L. ed. 47; Wild *v.* Bank of Passamaquoddy, 3 Mason 505; Bank of Pennsylvania *v.* Reed, 1 Watts & S. (Pa.) 101; Baldwin *v.* Bank of Newbury, 1 Wall. 234, 17 L. ed. 534; United States *v.* City Bank of Columbus, 21 How. 356, 16 L. ed. 130; Badger *v.* Bank of Cumberland, 26 Me. 428.

any reported cause. That the power given to directors to define, etc. the powers and duties of a cashier, does not enable them to deprive him of ordinary powers which by virtue either of judicial decisions or of banking usages the public are entitled to regard as inherent in his office, or at least that their action to this effect would not be binding as towards any third party who had not been expressly notified of it, is a principle which has been discussed in a general form [5] in Chapter VIII., and which needs no special elucidation with respect to cashiers as a class, in distinction from other officers.

If a cashier negotiates a loan for other than banking purposes, any person lending to him with a knowledge that the loan is to be thus improperly used will not create a valid obligation upon the bank. But in the absence of such actual knowledge, the presumption of regularity will bind the bank to a *bona fide* lender, however wrongful and unauthorized the conduct of the cashier in the transaction may in fact have been. So, if special instructions and authority are given to a cashier for obtaining a loan or discount, whether the same are to govern him generally in all such dealings, or only in a particular instance, all persons having notice of this special delegation of power will hold the bank only upon contracts made within its limits. So far as they are concerned, it is a valid restriction of the cashier's power to deal with them. But contracts with persons without notice will bind the bank, if within the ordinary business of borrowing. It is not uncommon to empower the president and cashier to effect a loan or discount; in such case they must agree upon the contract jointly, and the cashier alone could bind the bank only to persons who believed him to be acting in pursuance of his general authority, and were ignorant of this special delegation to the two jointly.

(*e*) The cashier is simply an agent of the bank, and he is bound to act in good faith in the transaction of the business of the bank; and those who deal with him are affected by any bad faith or want of authority of which they have knowledge. If the transaction itself is not in the usual course of business, or is one which requires specific authority on the part of the cashier to perform it, the person dealing with him will be required to show that he in fact had authority to do the act, otherwise it will be held to have

[5] Also see, especially, Bank of Vergennes *v.* Warren, 7 Hill (N. Y.) 91; Commercial Bank of Buffalo *v.* Kortright, 22 Wend. (N. Y.) 348; Sturges *v.* Bank of Circleville, 11 Ohio St. 153.

been done without authority. If the cashier transfers the notes of the bank to pay his private debt, the transaction will be invalid. No attempted transfer by the cashier of the bills, notes, or other securities of the bank will be valid, when it appears, either from the nature of the transaction, or the facts and circumstances existing at the time and known to the transferee, that the transfer was made in prejudice of the rights and interests of the bank.[6]

(*f*) A *bona fide* holder of paper is not affected by fraud of the cashier.[7] But if the cashier's employment does not comprehend the drawing or indorsing of checks, he cannot bind the bank by his fraud in so doing.[7a]

An overdraft by an agent of his principal's account, with the knowledge of the cashier of the bank, is a simple loan of money by accommodation, and the authority of the cashier cannot be questioned in a suit by the bank to recover the money.[8]

Holding out by Failure to Object

(*g*) Where for nearly a year a cashier had under his written agreement as cashier constantly pledged negotiable securities, with another bank for advances, his own bank was bound by his act, as his previous conduct had been so open and long continued that it must have come to the knowledge of any ordinary vigilant directory.[9]

Evidence of powers habitually exercised by a cashier with

[6] Everett *v.* United States, 6 Port. (Ala.) 166; Barnes *v.* Bank, 19 N. Y. 152; Smith *v.* Lawson, 18 W. Va. 212.

[7] National Pahquioque Bank *v.* Bethel Bank, 36 Conn. 325; Phillips *v.* Mercantile National Bank, 140 N. Y. 556, 35 N. E. 982; First National Bank *v.* Peck, 180 Ind. 649, 103 N. E. 643 (1913).

[7a] Shipman *v.* Bank, 126 N. Y. 318, 27 N. E. 371.

[8] Union, etc. *v.* Rocky, 2 Col. 248.

Whatever might be the rule of law as to a simple agreement to permit a party to overdraw his account it is competent for the cashier to agree to advance money to pay for a car load of horses under an arrangement for securing the bank by drafts for the proceeds accompanied by a bill of lading. Falls City State Bank *v.* Wehrli, 68 Neb. 196, 93 N. W. 994 (1903).

[9] Mercantile Bank *v.* McCarthy, 7 Mo. App. 318 (1879). See Lowndes *v.* City National Bank, 82 Conn. 8, 72 Atl. 150, 22 L. R. A. (N. S.) 408 (1909).

When the management of the bank is left to the president and cashier they have authority to make loans and give credit to drawers of checks when they have no money in the bank, and such credit is binding upon the bank and may be enforced. Kimball *v.* Farmers' etc. Bank, 50 Wash. 610, 97 Pac. 748 (1908).

the knowledge and acquiescence of the bank, defines his powers as to the public, if they are such as the directors have authority to confer on him.[10]

A bank for several years permitted its cashier to cancel trust deeds given to secure money loaned, and was thereby estopped to deny his power to cancel.[11]

A banking corporation may be represented by its cashier, where its charter does not otherwise provide, in transactions outside of his ordinary duties, and this without his authority to do so being in writing or appearing upon the records of the proceedings of the directors. His authority may be by parol, and collected from circumstances, or inferred, or implied from the general manner and settled course of the business, which he has been allowed to conduct without interference, and from the conduct or acquiescence of the corporation, as represented by the board of directors, whose duty it is to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officer.[11a]

Cashier's Payment of Forged Paper Binds the Bank

(*h*) If a cashier of a bank should pay to a *bona fide* holder a forged check drawn upon the bank, the payment could not be recalled, but would be obligatory; for it is within the duty of the cashier to answer drafts drawn on the bank; and the bank intrusts

[10] Merchants' Bank *v.* State Bank, 10 Wall. 604, 19 L. ed. 1008; Pensacola etc. Bank *v.* National Bank, 59 Fla. 347, 52 So. 294 (1910); Spongberg *v.* First National Bank, 18 Idaho 524, 110 Pac. 716, 1912A Ann. Cas. 95, n.

A cashier who is allowed to discount paper and lend the money of the bank has authority to cancel and surrender a bond and release its sureties and accept thereon another bond in a larger amount. German-American Bank *v.* Schwinger, 178 N. Y. 569, 70 N. E. 1099 (1904), affirming 75 App. Div. 393 (1902), 78 N. Y. S. 38.

[11] Martin *v.* Webb, 110 U. S. 7, 28 L. ed. 49, 3 Sup. Ct. 428 (1883); Spongberg *v.* First National Bank, 18 Idaho 524, 110 Pac. 716, 1912A Ann. Cas. 95, n.

When a cashier receives the payment of a note it is presumed, in the absence of proof to the contrary, that he passes it along to the credit of the bank and this estops the bank from making the defence of want of authority. First National Bank *v.* Pickens, 7 Ind. T. 725, 104 S. W. 947 (1907).

[11a] Carpy *v.* Dowdell, 115 Cal. 677, 47 Pac. 695; Wing *v.* Savings Bank, 103 Mich. 565, 61 N. W. 1009; La Banque D'Espargues *v.* La Banque, 2 Montreal L. R. (Q. B.) 64; Williams *v.* Dorrier, 135 Pa. St. 445, 19 Atl. 1024.

him with an implied authority to decide upon the genuineness of the handwriting of the drawer of the check when presented for payment.[12] See *contra*, § 461.

The same rule will apply to the payment of forged bank bills of a bank by the cashier, upon presentment by a *bona fide* holder. The payment cannot be recalled, for the cashier is bound to know the genuine paper of the bank.[13] But see § 633.

A contract made by a cashier to honor checks for a car load of horses, the drawee bank to be secured by a draft and bill of lading of the shipment, is valid; and if the bank has sufficient funds it is liable for the payment of such checks even though the drawers were indebted to the bank on other transactions.[13o]

(*i*) **Implications and Inferences arising from Acts of the Cashier.** — The bank is bound by all the legal implications or influences which must, as matter of law, grow out of those acts of the cashier which he does in the prosecution of any of the functions included in his agency. Indirectly these acts often closely resemble declarations or admissions. But they may bind where a declaration or admission might not bind, as has been already seen in the cases of forged paper used in illustration above. He has power to collect [13a] and to give receipts for the sums collected, in behalf of the bank; he has power to make, or to direct his subordinates to make, the entries in the books of the bank. These receipts and entries are admissible in evidence as the acts of the bank itself, and if the mere making them or the peculiar form of expression used in them, have any technical legal force or effect, the bank will be concluded thereby as by the necessary legal sequence of its own doings. In Badger *v.* The Bank of Cumberland,[14] a suit was brought to hold the defendant corporation as owner of a one-third interest in a vessel. It appeared that a debtor of the bank originally owning this one-third had bonded it to the bank to secure his debt; that afterward he had stated himself unable to pay, and had abandoned his interest to the bank; that thereafter an account had been settled between the owner of the remaining two-thirds, being also the ship's husband, and the cashier of the bank; that the cashier,

[12] Levy *v.* Bank of United States, 1 Binn. (Pa.) 27; Bank of United States *v.* Bank of Georgia, 10 Wheat. 333, 6 L. ed. 335.

[13] Bank of United States *v.* Bank of Georgia, 10 Wheat. 333, 6 L. ed. 335; Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 28.

[13o] Falls City State Bank *v.* Wehrli, 68 Neb. 75, 93 N. W. 994 (1903).

[13a] McLennan *v.* Bank, 87 Cal. 569, 25 Pac. 760.

[14] Badger *v.* Bank of Cumberland, 26 Me. 428.

acting in his official capacity, had thereupon receipted for what appeared by the account to be the bank's proportion of the net earnings; that the president had requested the rendering of the account, and had insured one-third of the vessel's value for the benefit of the bank. It was held that the cashier's receipt and his entry of the transaction on the books were acts within the scope of his agency, and that their legal effect and significance, as proof of part ownership by the bank, could not be controverted by the bank. Also, that the items of his entries in the books were conclusive proof of an adoption and recognition by the corporation of the president's acts in effecting the insurance.

(*j*) **Cashier's Ultra Vires Acts.** — We may briefly glance at a matter which will be fully elucidated hereafter. The general rule in regard to *ultra vires* acts is substantially that executory *ultra vires* contracts will not be enforced; but when acts of the cashier are acts of the bank under the principles of this section, and they raise liability in tort, this is not to be escaped by the plea of *ultra vires*, nor will it avail in case of an executed contract where the legislature has clearly indicated an intent that it should not be void, nor in favor of a party who has received and retained benefit under it, nor against a party who has acquired just rights by expenditure or parting with value on account of the transaction not knowing it was *ultra vires* (that fact being not ascertainable as matter of law on the facts actually or constructively known to such person), keeping in mind, of course, that contracts expressly void, or immoral, or against public policy, will not be enforced, for the maxims *in pari* and *ex turpi causa* are supreme.

In L'Herbette *v.* Pittsfield National Bank [14a] the cashier made invalid agreements at the time of receiving deposits, for example, to invest the money for the depositors in stocks and bonds, paying interest on the money in the meantime. No investment of the money being in fact made, the bank was not entitled to retain the funds nor was the depositor debarred from recovering them. There was nothing criminal or immoral about such an agreement, and the fact of its being *ultra vires* or unauthorized did not prevent recovery of the money.

In a Pennsylvania case [15] the bank received the benefit, namely, a deposit of $3000 on an *ultra vires* contract, and it was held that in a suit to recover the deposit *ultra vires* was no answer. The

[14a] 162 Mass. 137, 38 N. W. 368.

[15] Hagerstown Bank *v.* Loudon Savings Fund Soc., 3 Grant (Pa.) 135.

court said that acts done by the cashier in pursuance of the orders of the directors, as in this case, might bind the bank, though in contravention of the charter, or of the provisions of the organic law, and are therefore acts which in fact the directors have no power to authorize.

The case of The Salem Bank *v.* The Gloucester Bank [16] asserts generally that the bank is not liable for the act of the cashier done under the authority of the directors, if they have no power to confer that authority. The general rule must be admitted to be thus. But in this Massachusetts case no strong equity tempted the court to consider the possibility of admitting a limited exception to the broad principle.

§ 172. **Liability of the Cashier to the Bank.** — The cashier contracts for reasonable skill and care,[0] and for integrity and obedience to the law, and the proper, *i.e.* lawful, directions of his superiors. He is responsible for all loss resulting directly from his failure in any respect in his official duty,[0a] and it will not avail him that he acted by order of the directors, if the facts of which he had notice made such order wrongful as matter of law.[0b] If so far as any facts he knew or had constructive notice of could throw light on the matter the order was lawful, the bank cannot hold him, for it is not his business to supervise the board, and it is his business to obey them. Such is the law of this topic, as clearly appears from the following cases.

Responsibility for Subordinates

(*a*) The cashier is, of course, liable to the bank in an action of damages, to make good any and all injury arising from his fraudulent or wrongful acts of an official nature, from his unauthorized

[16] 17 Mass. 1.

[0] § 172. Pryse *v.* Farmers' Bank, 33 S. W. 532 (1895); Vance *v.* Mottley, 92 Tenn. 310, 21 S. W. 593 (1893); Wallace *v.* Bank, 89 Tenn. 630, 15 S. W. 448; Exchange Bank *v.* Gardner, 104 Iowa 176, 73 N. W. 591 (1897).

[0a] He is liable for negligence in paying out money on unauthorized checks. Daugherty *v.* Poundstone, 120 Mo. App. 300, 96 S. W. 728 (1906). See First National Bank *v.* Peck, 180 Ind. 649, 103 N. E. 643 (1913); and for allowing overdrafts without the consent of the board of directors or advisory committee. Western Bank *v.* Coldewey, 120 Ky. 776, 83 S. W. 629 (1905).

[0b] Acquiescence by the directors in the conduct of the cashier will exempt him from failure to observe the by-laws of the bank in respect to an overdraft. Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228 (1910).

assumption of power, or from his breach of the directions imposed upon him to govern his conduct in his agency.[1] How far he is responsible for innocent errors and mistakes has been considered under the topic of "Official Bonds." The tellers, book-keepers, etc. are his subordinates and sub-agents. But he is not answerable, like an ordinary principal, for their defaults, whether intentional or innocent, unless perhaps in those cases in which it can be shown satisfactorily that the default was occasioned, or opportunity or temptation thereto was furnished, by his improper or negligent performance of his duty of general superintendence.[0c] This rule is supported by the necessity of the business. It is impossible for him to be omnipresent and omniscient among all his servants in the institution, and he is not liable for his failure to perform this impossibility. He is required only to direct them properly in the performance of their several functions, and to exercise the most thorough supervision which is practicable in view of the amount of daily business and the method of conducting the routine of daily affairs. The sub-officers and their respective provinces are usually well known. But if the duties which are ordinarily done solely by the cashier become too onerous to be executed by one man, any arrangement for a partial sub-delegation which circumstances authorize the cashier in assuming to be satisfactory to and ratified by the directors, will be valid, and will thereafter save the cashier from liability for frauds or errors committed in the delegated department.[2] A cashier is not bound to examine every entry made by his subordinates, but must exercise

[1] Austin *v.* Daniels, 4 Den. (N. Y.) 299; Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228 (1910).

A cashier of a bank who had acquired shares in the institution transferred them to his wife, and, being desirous of severing his connection with the bank, tendered his resignation, and, as a condition to the resignation, he and his wife sold the bank stock, receiving in payment funds of the bank. At the time of the sale the cashier was still in control of the assets of the bank and he prepared the drafts and checks drawn on its correspondent, although they were signed by the vice president, it appearing that the other officers of the institution negotiated the sale. It was held that, under a statute prohibiting banking corporations from purchasing their own stock or using their own funds for that purpose the cashier was liable to the creditor of the bank for such funds. United Securities Co. *v.* Ostenberg, 60 Colo. 249, 152 Pac. 1163 (1915).

[0c] A by-law which provides that a cashier shall be "responsible for all moneys, funds and valuables of the bank" renders him liable for losses resulting from mistakes or misfeasances of his subordinates. Rio State Bank *v.* Amondson, 141 Wis. 82, 123 N. W. 634 (1909).

[2] Bank of the State *v.* Comegys, 12 Ala. 772.

such care and supervision as a man of ordinary prudence would in his own affairs.[3] If he employs an assistant without authority or necessity, the cashier is liable for money of the bank fraudulently embezzled by such assistant while thus employed.[3a]

Besides the right to a suit in damages which grows out of a cashier's malversation in office, specific statutory penalties are often affixed to specific acts of wrongdoing. Whether the bank by suing to enforce the penalty deprives itself of the right also to sue in damages, must be decided by a consideration of the nature of the penalty. It is a fundamental truth that the bank has a right to be reimbursed in money for all its losses directly caused by the wrongful conduct of its agent. If the provisions establishing the penalty make any satisfactory arrangement for this reimbursement, then the proceeding for the penalty must be taken as clearly intended to supersede the proceeding for damages. But if it is not so provided in the statute, it must be assumed that it was intended that the two actions might be prosecuted independently of each other. The awarding of the suit for the penalty is akin to authorizing the recovery of vindictive damages, in addition to the simple damages which may still be demanded in the other suit. The only decision of interest occurring under penal statutory provisions is one which declared that a penalty set upon the cashier's conversion of any " money, bank-bill, or note " could not be applied to his conversion either of promissory notes, not being bank-notes ordinarily so called and intended for circulation as currency, or of any other species of commercial paper.[4]

Directors' Order Will not Excuse an Illegal Act

(*b*) Where the directors authorize the act which has caused loss, if there is any intrinsic illegality or impropriety in the act itself, the cashier cannot plead either the formal vote, the ratification, or the connivance of the government of the bank. The directors can by no possibility authorize him to commit a fraud, to misapply funds of the bank, to subject them to improper risks, to make private profits by the use of them. He can by no possibility believe that the directors can thus authorize him. The question is not who is to reap the fruits of the malfeasance. The cashier is

[3] Batchelor *v.* Planters' National Bank, 78 Ky. 435.

[3a] Vance *v.* Mottley, 92 Tenn. 310, 21 S. W. 593 (1893). See § 174.

[4] State *v.* Stimson, 4 Zabr. (N. J.) 9.

responsible for obeying an order which he knows to be illegal,[4a] and to be given for an immoral purpose, equally whether he is or is not to participate in the illicit gains. The empty semblance of obedience to superiors cannot take away the genuine character of connivance in a wrongful proceeding, and would be "void to protect the cashier in his wrongful compliance." [5] In the cited case it was held that the cashier could not be protected from liability to reimburse a loss arising from his having allowed a customer to overdraw, by showing that the directors had been wont to countenance him in a custom to allow good depositors to overdraw without taking security from them. For here, it was said, the act was intrinsically wrongful. It was a dishonest use of the corporators' funds. Being thus in itself inexcusable, it could not be excused by a mere show of authority.

(*c*) An action founded on the negligence of the cashier in the performance of his duty does not survive his death and is not provable against his estate.[6]

§ 173. **Cashier as a Trustee.** — It has never been held that the position of cashier was precisely that of a legal trustee.[0] Yet the qualities of a trust can never be wholly wanting where an agent has committed to him the care and management of the property of other persons for certain definite purposes. To say that he cannot either directly or indirectly use his influence, or any of his powers, to secure advantages to himself, is only to assert what has never been called in question; and it makes no difference that his conduct was not, or was not intended to be, hurtful to the bank. If he wishes any species of accommodation from the bank, even though

[4a] But a cashier who is not charged with the responsibility of making loans or selecting securities is not guilty of negligence or of any violation of his duties to the bank or its stockholders, by entering, under the direction of the manager of the bank, to the credit of a known financially unsound corporation a loan on a note indorsed by a solvent firm, and paying out the same on the check of said corporation. Warren *v.* Robison, 25 Utah 205, 70 Pac. 989 (1902).

Nor is a cashier who on purchasing for himself property from a debtor of the bank agrees that the price shall be applied in a certain manner on the indebtedness to the bank individually liable for a breach thereof, since he has acted in his official capacity in making the agreement. Pease *v.* Francis, 25 R. I. 226, 55 Atl. 686 (1903).

[5] Minor *v.* Mechanics' Bank of Alexandria, 1 Pet. 46, 7 L. ed. 47; Austin *v.* Daniels, 4 Den. (N. Y.) 299.

[6] Brandon Bank *v.* Brigg's Estate, 70 Vt. 599, 41 Atl. 586 (1898).

[0] § 173. A cashier is not a trustee in the strict sense of the word, though he is a quasi-trustee. Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228 (1910).

he might have power to grant the same to any other person, he will not be safe in granting it to himself, without express permission from the board of directors. The familiar rule of agency, that one shall not be agent for any other party in a contract in which he is himself interested, or *a fortiori* in which he is a principal on the other side, suffices to prohibit this.[0a] But further than this, in his own dealings with the bank he is held, like a trustee, to exercise a much greater degree of scrupulosity and thoroughness of regard for the interests of the bank than in the conduct of like dealings had by other people with it. Thus, if he has a loan from it and gives to it his promissory note for the amount, if he does not pay the note promptly upon its maturity, it will not be enough that he treats it precisely in the same manner in which he is wont to treat other unpaid notes belonging to the bank. He has an extraordinary duty to perform in regard to it, and must bring the facts of its being overdue and unpaid distinctly before the directors in their official capacity. If the period of the Statute of Limitations has elapsed since the date of the note, he will not be allowed to take advantage of it simply because he has left the note in the bundle of unpaid notes, which from time to time was examined by the directors for the purpose of putting in suit such of the notes contained in it as they might see fit. The statute will begin to run only from that date upon which the cashier can establish by affirmative proof his express notification of the whole matter to the directors.[1]

Property Bought with Stolen Funds

(*a*) But if the cashier embezzles funds of the bank and invests them, a court of chancery has no power to fasten a trust upon the investment, and to declare the cashier to be a trustee, holding what he has purchased in trust for the bank. The mere fact that the cashier obtained the means of purchasing by a theft from the corporate funds, provided that he actually made the purchase in his own name and on his own account, does not create such a case of implied or resulting trust as to give jurisdiction to a court of equity for the purpose of taking possession of the purchased prop-

[0a] A cashier cannot, without special authority, bind the bank by discounting his own notes. Bank of Monticello *v.* Dooly, 113 Wis. 590, 89 N. W. 490 (1902).

[1] Harrisburg Bank *v.* Forster, 8 Watts (Pa.) 12. See also Conyngham's Appeal, 57 Pa. St. 474.

erty and ordering that indemnification be made from it to the bank.[2]

But in Tecumseh National Bank *v.* Russell [2a] the above statement is disputed, and the court holds that where a cashier unlawfully used the funds for the purchase of stock in another bank, in his own name, a court of equity will charge the stock with a trust in favor of the bank owning the funds.

When the cashier paid for bonds purchased from the bank with his personal check and credited his account with the amount thereof the funds used in paying the checks were not stolen, and could not be recovered by the bank even though the cashier subsequently misappropriated the bonds.[2b]

Equity will Compel Cashier to Account

(*b*) The relation of trust between the bank and cashier gives equity jurisdiction to compel an account for money misappropriated or other breach of trust.[3]

In the second case quoted, it was held that the failure of the managers to repudiate the bond and mortgage (given by one who was treasurer and one of the managers of a savings bank as security, the land not being worth double the mortgage as required by the bank's charter) for six years was no defence, whether the breach of duty was known or not to the other managers. The fault of other officers could not take away the remedy due the stockholders against this one.

Profits derived from the sale of lands by a cashier, in his capacity as such and while in discharge of his duties, belong to the bank.[4]

§ 174. **The Cashier's Subordinates.** — Of course, even in a small corporation, it will be impossible for the cashier personally to do all the business included in these general functions. He must have his subordinates, whose offices will be offshoots of his own. "They are under his direction, and are, as it were, the arms by which designated portions of his various functions are performed." [1] But he will not be liable for the default of any of these

[2] Pascoag Bank *v.* Hunt, 3 Edw. Ch. (N. Y.) 583.

[2a] 50 Neb. 277, 69 N. W. 763 (1897).

[2b] First National Bank *v.* Hudson, 166 App. Div. 51 (1915), 151 N. Y. S. 595.

[3] Merchants' Bank of Charleston *v.* Jeffries, 21 W. Va. 504 (1883); Williams *v.* Riley, 34 N. J. Eq. 398 (1881).

[4] Mt. Vernon Bank *v.* Porter, 148 Mo. 176, 49 S. W. 982 (1898).

[1] § 174. Merchants' Bank *v.* State Bank, 10 Wall. 604, 19 L. ed. 1008.

subordinates, unless his own laches or collusion has caused or aided it, or unless he himself has employed them without authority or necessity.[1a] The paying and receiving tellers are in fact only officers detailed to take charge, each of a special duty, falling within the general range of the cashier's position.[2] A paying teller can only pay out money, and a receiving teller can only receive it, on behalf of the bank. But though there be incumbents acting in each of these respective offices, there is judicial authority for saying that the cashier, by his general and higher power, may at any time make or receive a payment on behalf of the bank. Perhaps on any particular occasion his doing so might be such a foolish interference in a business of which he did not know all the details from hour to hour, that he could be held liable to the bank for negligence or an improper performance, if he should pay out money when he ought not. But this would be only a question of liability arising wholly between the principal and the agent. The act itself would be within the scope of a cashier's authority, and would bind the bank in favor of any innocent third party.[3] This does not necessarily conflict with the rule that, if the bank nominates a certain person to receive money, it will be bound only by payments made to him. For, though the bank may nominate a receiving teller, yet the cashier has a co-ordinate power with him in this respect by virtue of the general scope of his agency. The bank simply has two officers competent to receive, instead of only one. But, though the cited case seems to go the length of sustaining this doctrine, the opinion embodying the views of the court is far from carrying perfect conviction with it. Practically, the confusion incident to conducting business in accordance with the rule would breed endless mischief. As matter of strict law, it is certainly fair to argue that the especial action of the bank in giving to another the charge of a function which *otherwise* would belong to the cashier, is equivalent to a public taking away of that function altogether from the cashier. Substantially it is *expressio unius, exclusio alterius*. The teller is the cashier's subordinate, and must take orders from him. But the precise act of receiving or paying cash over the counter may be regarded as exclusively

[1a] Vance *v.* Mottley, 92 Tenn. 310, 21 S. W. 593 (1893).

[2] Farmers & Mechanics' Bank *v.* Butchers & Drovers' Bank, 16 N. Y. 125.

[3] State Bank *v.* Kain, 1 Breese (Ill.) 45.

within the teller's province by virtue of the supreme order of the board of directors, with which even the cashier cannot interfere.

(*a*) **Teller.** — The office of teller is a narrow one, strictly limited to the specific function of receiving or paying out funds.[3a] If there be two tellers, one delegated to receive, the other delegated to pay out moneys, neither can properly discharge the duty of the other. A person wishing to make a deposit is bound to make it with the receiving teller. If he hands the money to the paying teller, he does not thereby accomplish his deposit, but only makes that teller his own agent to transfer the money to the receiving teller or to the bank; and the bank will be liable for the amount only if the paying teller fulfils this undertaking, and pays in the money to the proper officer or to the funds of the bank.[4]

§ 175. **Temporary Substitute.** — A clerk who in the temporary absence of the cashier is charged with the performance of the duties of that office, does not succeed to the cashier's full powers, unless by virtue of a special vote and instructions from the board of directors. Otherwise the cashier can clothe him with no greater power than simply such as is necessary for carrying on the usual and ordinary business of the bank, such as the payment of checks, the receipt of payment upon notes held by the bank, and the delivery up of the paid notes. But the delegate has no authority to *transfer* or *pass title* in any paper of the bank. Paper held by the bank in its own right, or for collection for other persons, and payable elsewhere, he may *transmit* to the agents of the bank for collection; and if it requires indorsement as a preliminary to collection, he may indorse, but only in such limited form as is strictly indispensable for the enabling the collection to be made, and not so as to vest any other or higher title in the indorsee. Where he so sends forward notes for collection, whether bearing his indorsement on behalf of the bank or not, the agents receiving

[3a] A teller has authority to discount a note for a particular person when it has been his custom to accept and discount notes for persons doing business with the bank and had often, in the presence of the cashier, and with the knowledge and approval of the officers, accepted and discounted other notes for such person. Iowa National Bank *v.* Sherman, 17 S. D. 396, 97 N. W. 12 (1903).

The powers of a teller seem to be limited to passing on the genuineness of signatures of checks presented for payment and in paying out money of the bank on checks, but he has no authority to certify them. Muth *v.* St. Louis Trust Co., 94 Mo. App. 94, 67 S. W. 978 (1902).

[4] Thatcher *v.* Bank of State of New York, 5 Sandf. (N. Y.) 121.

them will acquire no title in them and no lien of any description upon them for any balance due from the transmitting bank.[1]

Where a statute allows the cashier to make affidavits of demand on promissory notes, an acting cashier may make such affidavit.[2]

§ 176. **Cashier after the Expiration of the Franchise.** — Where by the charter itself or act of legislature a bank is continued in existence as a corporation after the lapse or surrender of its franchise, for a limited time and for the purpose of closing its affairs, the directors may legally appoint a cashier to act during such period. Any irregularity attendant upon the choice or process of qualification of these directors will not affect the validity of the acts of the cashier chosen by them, provided they are *de facto* directors, assuming to be such under a shadow of title, and acting as such at the time of making the appointment.[1]

(*a*) **Estoppel.** — A cashier, by performing in his official capacity acts and duties which are not inconsistent with the nature of his office and functions, may be held to be thereby estopped in a suit against himself to deny that their performance was ordered by the board of directors.[2]

He is also estopped from denying his agency for the bank where he transacts business for it officially and at its instigation.[3]

[1] § 175. Potter *v.* Merchants' Bank, 28 N. Y. 641.

[2] Philadelphia National Bank *v.* Morgan, 1 Marvel (Del.) 265, 40 Atl. 1113.

[1] § 176. Cooper *v.* Curtis, 30 Me. 488.

[2] Durkin *v.* Exchange Bank, 2 P. & H. (Va.) 277.

[3] Mount Vernon Bank *v.* Porter, 52 Mo. App. 244.

CHAPTER XII

RECEIVING DEPOSITS

CHOICE. Cashier's authority. § 161.

§ 178. A bank may, at common law, choose from whom it will receive deposits, and how long it will continue to do business with any customer. The relation may be broken by either party at any time, saving the existing liens and contract rights of both parties.

§ 178. (*a*) Statute law sometimes provides against receiving deposits from certain persons, as, *e. g.*, those reasonably known by the bank to be unsafe.

CARE.

§ 179. Should be exercised by the depositor to make delivery to the proper officer and at the bank. §§ 98 *j*, 174 *a*.

§ 181. And by the bank to give credit to the proper party. (See case of deaf depositor.)

THE RECEIVING OFFICER. § 161.

§ 179. The cashier or teller may receive deposits, or any other officer actually authorized by the board, or who has habitually received them without objection from the bank.

§ 179. No officer has inherent right to receive deposits away from the bank, though in this matter also the bank may be bound by a long-continued course of conduct without objection from the directors.

§ 180. If the same officer acts for two banks doing business over the same counter, the question as to which bank is the recipient of a given deposit depends, (1) as to the depositor, on his understanding with the officer; (2) as to the banks, upon the agreement between them under which the officer acts.

§ 180. A. APPROPRIATION OF DEPOSITS. §§ 323, 327 *d*, 556.

§ 178. **The Relation is at the Will of the Parties. — From whom Deposits may be received.** — It is of the essence of the business of banking that the bank or banker should receive on deposit [0]

[0] § 178. When a note held by a bank as collateral security is paid after the loan secured by it has been repaid the money received becomes a deposit for the benefit and use of the owner if he desires to so consider it. First National Bank *v.* Pickens, 7 Ind. 725, 104 S. W. 947 (1907).

the money and funds of other persons.[0a] In receiving deposits and opening accounts the bank is free to choose whom it will as customers from among those that offer.[0b] No duty exists on the part of the bank towards the public akin to that which binds common carriers to take every person who requests them to do so, and who is in a fit condition to be taken, or that which obliges hotel-keepers to admit any proper applicant as a guest. The bank may select arbitrarily, and cannot be held accountable to any person for the propriety of its action in this matter.[1] The receiving a deposit [1a] from a person, without explanation or understanding to the contrary, at once and without more makes that person a customer of the bank.[1b] But no implied undertaking

[0a] One bank may be a depositor in another bank. State *v.* Corning State Sav. Bank, 136 Iowa 79, 113 N. W. 500 (1907); Elmira Bank *v.* Davis, 73 Hun (N. Y.) 357, 26 N. Y. S. 200, affirmed in 142 N. Y. 590, 37 N. E. 646, 25 L. R. A. 546; Davis *v.* Elmira Bank, 161 U. S. 275, 40 L. ed. 700, 16 Sup. Ct. 502.

[0b] A depositor may deposit in his own name or in a business name or in his own name as trustee or agent. But a bank cannot properly collude with a depositor for the purpose of misleading creditors and covering up his funds under a fictitious name so as to prevent them being subject to garnishment. Bank of Lawrenceville *v.* Rockmore, 129 Ga. 582, 59 S. E. 291 (1907).

A husband may legally deposit money in a bank in the name of his wife so that he can draw checks against it. Hanna *v.* People's National Bank, 182 Ill. App. 528 (1913).

A county treasurer has no authority to deposit public funds in a bank not designated by the county commissioners as a depository. State *v.* Lawrence, 80 Kan. 707, 103 Pac. 839 (1909).

[1] Thatcher *v.* Bank of State of New York, 5 Sandf. (N. Y.) 121; Jaselli *v.* Riggs National Bank, 36 App. Cas. (D. C.) 159, 1912C Ann. Cas. 119, n., 31 L. R. A. (N. S.) 763, n.; Heath *v.* New Bedford Safe Deposit Co., 184 Mass. 481, 69 N. E. 215 (1904).

The relation is contractual and cannot be created except by mutual consent. Wilson *v.* First National Bank, 176 Mo. App. 73, 162 S. W. 1047 (1914).

[1a] When the holder of a check presents it to the bank on which it is drawn which had money to pay it and which placed it to his credit at his request it is equivalent to placing money to his credit, and it is immaterial that the drawer did not have the amount of money necessary to pay the check deposited to his credit on the books of the bank at the time it was drawn. Hubbard *v.* Pettey, 37 Tex. Civ. App. 453, 85 S. W. 509 (1904), citing Hoskins *v.* Dougherty, 29 Tex. Civ. App. 313, 69 S. W. 103.

[1b] Jaselli *v.* Riggs National Bank, 36 App. Cas. (D. C.) 159, 1912C Ann. Cas. 119, n., 31 L. R. A. (N. S.) 763, n. See Heath *v.* New Bedford Safe Deposit Co., 184 Mass. 481, 69 N. E. 215 (1904), where the bank received money and credited it to a party in another State, notifying him thereof by telegraph.

But when a grain dealer arranges with a bank to cash the checks of

to allow him to continue so for any length of time exists.[1c] Neither is he under any obligation to continue so. The relationship may be dissolved at any time by either party, saving the then existing liens and rights of each.[2]

(*a*) In Wisconsin, banks are prohibited from receiving a deposit from any one whom they have reason to know is unsafe or insolvent, and this is held not to contravene the Constitution of the United States or of Wisconsin. It is not a denial of the equal protection of the laws to all persons. U. S. Const., Amend. XIV.[3]

§ 179. **Depositors should be careful to deliver their Deposits to one authorized to receive them.** — It is essential that the depositor[0] should deliver his money to an officer of the bank who may properly receive it on behalf of the bank; otherwise the bank will not be liable for it, if it should be lost or embezzled, or should become worthless during the course of its transit into the hands of such proper officer.[0a] Ordinarily banks in the United States have a "receiving teller", so called, whose special function it is to receive funds for his deposit. If there is such an officer, a depositor who makes his payment into the hands of any other officer simply makes that recipient his own agent on this occasion for the purpose of transferring the funds to the bank, or to the receiving teller. If the officer fulfils his agency, and the funds, undiminished in amount, come into the possession of the bank, or reach the hands of the receiving teller, then the debt of the bank

his agent given for the purchase of grain, and is to pay the money so advanced from time to time by drafts on the dealer, and deposits a small amount at the time of making such an arrangement as an indemnity against such advancements, the relation of banks and depositor is not created. Armour *v.* Green County State Bank, 112 Fed. 631 (1902).

[1c] Jaselli *v.* Riggs National Bank, *supra.*

[2] Chicago Marine & Fire Ins. Co. *v.* Stanford, 28 Ill. 168; Jaselli *v.* Riggs National Bank, 36 App. Cas. (D. C.) 159, 1912C Ann. Cas. 119, n., 31 L. R. A. (N. S.) 763, n.; Reid *v.* Charlotte National Bank, 159 N. C. 99, 74 S. E. 746 (1912); Elliott *v.* Capital City State Bank, 128 Iowa 275, 103 N. W. 777, 111 Am. St. Rep. 198, 1 L. R. A. (N. S.)11 30, n. (1905).

[3] Baker *v.* State, 54 Wis. 368 (1882); Hyland *v.* Roe, 111 Wis. 361, 87 N. W. 252, 87 Am. St. Rep. 873 (1901).

[0] § 179. A depositor is one who delivers to or leaves with a bank money subject to his order. State *v.* Corning State Sav. Bank, 136 Iowa 79, 113 N. W. 500 (1907); Catlin *v.* Savings Bank, 7 Conn. 487.

[0a] Van Wagenen *v.* Genesee Falls Savings Association, 88 Hun (N. Y.) 43; Bickley *v.* Bank, 39 S. C. 281, 17 S. E. 977 (1892); Jumper *v.* Bank, 39 S. C. 296, 17 S. E. 980 (1892); Aeverell *v.* Second National Bank, 19 D. C. 246 (1890); Stallo *v.* Wagner, 220 Fed. 360 (1914); Russo-Chinese Bank *v.* Li Yan Sam, 1910 A. C. 174.

accrues. Otherwise the deposit is not completed, and the bank is not liable, although the fault be wholly that of its officer to whom the payment was originally made. The corporation has not delegated to him that duty, and is not responsible for his performance of it. Very often the receiving officer has his peculiar and customary stand at the bank counter, made known to the public by a sign bearing the words "Receiving Teller." In such case, it would seem that the payment should be made to him at this stand. Certainly it must be made to him within the banking-rooms. Otherwise, until he has brought the money into the banking-rooms, its safety is still at the risk of the payer. Neither will it suffice for a depositor, seeking to evade the consequences of these rules of law, to show isolated cases of a contrary practice by his bank. Solitary instances of payments of funds to another officer than the receiving teller are impotent to alter established principles. So long as such an office exists, and the incumbent continues duly to exercise his functions, the money for deposit ought in some manner to reach his hands, and proof of its occasional coming to its destination through the hands of other agents of the institution is not enough to show that such a course is good and sufficient upon these occasions when it fails to effect this disposition of the money.[1]

Delivery of a deposit to the cashier, teller, or assistant teller at the bank,[2] or to any officer of the bank having actual authority to receive it, or authority implied from usage, is good. For example, where a porter had for years been accustomed, without objection from any officer, to receive money from the express company at the bank, clearing-house, or the express office, a delivery to him at the express office was held good.[3]

§ 180. **Two Banks receiving Deposits by Same Officer.** — B. was treasurer of a savings institute and cashier of a bank, both of which corporations did business over the same counter. The

[1] Manhattan Co. *v.* Lydig, 4 Johns. (N. Y.) 377; Thatcher *v.* Bank of State of New York, 5 Sandf. (N. Y.) 121; Sterling *v.* Marietta & Susquehanna Trading Co., 11 Serg. & R. (Pa.) 179; Terrell *v.* Branch Bank, 12 Ala. 502; Fidelity Deposit Co. *v.* Colby, 148 App. Div. 363 (1911), 132 N. Y. S. 20. But see East River National Bank *v.* Gove, 57 N. Y. 597, in which the foregoing cases are discussed and a contrary conclusion is reached.

[2] See chapter on Cashier. Hotchkiss *v.* Artisan's Bank, 2 Keyes (N. Y.) 564.

[3] Sweet *v.* Barney, 23 N. Y. 335. See Burnell *v.* San Francisco Sav. Bank, 136 Cal. 499, 69 Pac. 144 (1902).

institute was by agreement to receive no money, but all its funds were to be deposited in the bank. B. received from C. at the counter certain money which she wished to deposit in the institute; but B. embezzled it and did not credit it to the institute nor upon the cash-book of the bank. It was held that, as between C. and the institute, B. received the money as its treasurer; yet as between the bank and the institute, under the agreement, it was received by him as money of the bank, and the bank was liable to the institute therefor.[1]

So where a check payable to B. as treasurer was received by him to pay money due the institute, and was indorsed by him as treasurer and then as cashier, and remitted for collection, though no credit was given the institute therefor on the books of the bank, the check had become the property of the bank; and the institute could recover for it.[1]

§ 180 A. **Appropriation of Deposits.** — The depositor may appropriate his deposits; if he does not, the bank may choose how it will appropriate them, subject to the rule, that, as between a secured and an unsecured debt, the appropriation must be to the former for the benefit of the surety, and if neither makes an appropriation, the law will appropriate the deposits in accordance with this rule.[1]

§ 181. **Care in Crediting.** — The deposit must be carefully credited to the proper person. Where two persons, A. and B., came to make a deposit, A. handing in the money and B. saying it was to be put to his credit, which the bank did; it was held that the bank was negligent, the fact being that A. was deaf and did not hear B.'s order.[1]

[1] § 180. Fishkill Savings Inst. *v.* Bostwick, 92 N. Y. 564. See also Kelley *v.* Chenango Valley Savings Bank, 22 App. Div. (Hun, N. Y.) 202 (1897).

[1] § 180 A. Kinnaird *v.* Webster, 10 Ch. D. (Eng.) 139 (1878).

[1] § 181. Winter *v.* Bank of New York, 2 Caines (N. Y.) 337. See Jackson Ins. Co. *v.* Cross, 9 Heisk. (Tenn.) 283.

CHAPTER XIII

KINDS OF DEPOSIT

SPECIAL. §§ 189, 565, 567. See § 209, 567 *c*.

§ 183. For safe keeping; identical thing to be restored; created by express contract, or implied from circumstances, as the fact that money is sealed up, or the deposit is not of a nature that can be credited on general account as cash.

§ 184. Coin may be a special deposit, by usage.

The presumption is in favor of general deposit in case of United States coin, and in favor of special deposit in case of foreign coin.

SPECIFIC. §§ 206, 213, 565, 567, 569 *et seq.*

§ 185. Any deposit for a purpose other than mere safe keeping and return, or credit on general account, is a specific deposit, as collaterals, or money to transmit, or to pay a note.

GENERAL. §§ 288, 565.

§ 186. A deposit made with intent to pass the property to the bank, to be credited on general account, is a general deposit, and

§ 187. the presumption in case of the deposit of loose money, or of paper or coin credited as cash, is that such a deposit is intended, unless there be a contract or usage *contra*.

§ 186. (*a*) The addition of such titles as "Clerk", "Treas.", etc. to the depositor's name does not affect the nature of the deposit.

§ 186. (*b*) If checks or money are sent with an order to credit on account, and this is done, the deposit is general, even though a second clause in the order provides for paying a specific note.

CHANGE OF A DEPOSIT FROM ONE FORM TO ANOTHER.

§ 187. May be accomplished by an agreement, or order acted upon, or by the bank's crediting generally a specific deposit, or the proceeds of one, and the best opinion is, that when this is done, and the specific funds mingled indistinguishably with the general funds of the bank, whether rightfully or not, the depositor can only claim equally with the general depositors and creditors.

A bank may put up the amount due a depositor in a package, and tender it to him, and if he refuses it, the bank will thereafter be liable only as a gratuitous bailee.

§ 183. **A Special Deposit** is where the whole contract is that the thing deposited shall be safely kept, and that identical thing returned to the depositor.[1]

[1] § 183. State *v.* Clark, 4 Ind. 316; Keene *v.* Collier, 12 Mete. (Ky.)

And this contract may arise by express agreement, or by the nature of the deposit; as if it were gold plate, or money, or securities locked in a box, or sealed up in a bag or package. (§ 102 *e*, *h*.)

In such cases the presumption is that the deposit is special, though in case of the deposit of loose money the presumption is the opposite.[2]

Usage as Affecting the Nature of a Deposit

§ 184. **When Deposit in Coin is Special.** — In Maryland where gold coin was deposited and an entry "Cash, (coin) $3000", was made in the depositor's bank-book, it was held that, if the depositor could show that this entry by usage or by special circumstances, imported an agreement to repay the amount in coin, it could only be so repaid, and that an offer of legal tender notes would not discharge the bank. Nor was the contract to return *in specie* varied by showing that the depositor had subsequently drawn checks which had been paid in legal tender notes, it also appearing that he had never, since making the deposit, had a less balance than $3000 to his credit in the bank.[1] But the purport of Thompson *v.* Riggs [2] seems to be contrary to this. The court there regard the entry of the word "Coin" as a mere memorandum, and decline to admit evidence of a usage of bankers to regard it as constituting a contract to repay in coin. The opinion is unfortunately obscure, but such seems to be its import. These cases do not turn so much upon the point of special deposit as of a coin contract, so called.

Distinction between United States and Foreign Coin

On principle, it would seem that it would be always proper and legitimate to draw a distinction, for various purposes, between coin of the United States and coin of a foreign country, which

417; M. A. Association *v.* Jacobs, 13 Ill. App. 340; Warren *v.* Nix, 97 Ark. 374, 135 S. W. 896 (1911); Nashville Produce Co. *v.* Sewell, 121 Ga. 278, 48 S. E. 945 (1904); Officer *v.* Officer, 120 Iowa, 389, 94 N. W. 947, 98 Am. St. Rep. 365, n. (1903); Miami *v.* Shutts, 59 Fla. 462, 51 So. 929 (1910); Butcher *v.* Butler, 134 Mo. App. 61, 114 S. W. 564 (1908); Covey *v.* Cannon, 104 Ark. 550, 149 S. W. 514 (1912). See Continental etc. Bank *v.* Chicago etc. Trust Co., 199 Fed. 704 (1912).

[2] Dawson *v.* Real Estate Bank, 5 Ark. 299.

[1] § 184. Chesapeake Bank *v.* Swain, 29 Md. 483.

[2] Thompson *v.* Riggs, 5 Wall. 663, 18 L. ed. 704.

has not been adopted into ordinary daily currency among the people of the United States. If a deposit of the former be made in ordinary times, when coin is at par, it must be taken as a general deposit unless otherwise explained. But if a deposit of the latter be made, it should be taken as a special deposit, in the absence of express understanding. For it is not properly a payment. Payment, except by agreement of parties, could not be made in such material. The bank cannot, practically at least, pay it out again to its customers; it cannot use it for meeting the checks of depositors, not even of the very party depositing it, if it be in fact a general deposit. In short, foreign coin is, in the United States, so far in the nature of a commodity that it cannot pass either to or from a banker as money unless by force of an agreement between the parties, either express or to be implied from their usual course of dealing together. So if it should be the case that the present or any future Legal Tender Act should make it sufficient for a bank to return in treasury notes the nominal sum which it has received in gold coin of the United States, it yet would not follow that a similar return of the nominal value of foreign coin would be, as a matter of logical necessity, equally legitimate. The coin and the notes of the United States are both currency of the United States, and the law simply refuses to recognize any distinction or difference between them. But the foreign coin is different from both these kinds of currency; even if it were to be replaced by gold coin of the United States, still its value, in the shape of exchange, would be credited or debited in making up the judgment. None the less should its value be estimated in the usual currency of the country, which is legal tender, and is the only money practically in use. Further, it certainly seems to us that both law and justice would sustain the rule, that where gold is practically a commodity even when in the shape of coin, when it has ceased to circulate and to be transferred from man to man as current money, then a deposit in it should no longer be regarded as presumably a deposit of so many dollars, returnable in paper of much less real value, but should be considered *prima facie* a special deposit, as much as gold dust or jewels in ordinary times.

§ 185. **Specific Deposit.** — When money is deposited to pay a specified check drawn or to be drawn, or for any purpose other than mere safe keeping, or entry on general account, it is a specific deposit, and the title remains in the depositor until the bank pays

the person for whom it is intended, or promises to pay it to him.[1]

A deposit of money to pay a specified note, or of a bill to be collected, or of paper or goods as collateral security, or of bonds in order that the bank may act as agent to collect the interest for the owner, is a specific deposit.

Where a check on a bank is deposited with the cashier, for which he gives a certificate of the receipt with the understanding that the amount, in money, is to be delivered to a third person when certain abstracts of title are received by the cashier from such third person, the deposit is specific and the bank is bound to pay in money although no actual money is deposited.[2]

Proceeds of Collection

When a collection has been made, the proceeds may be credited on general account and so become a general deposit, or may be kept separate as a special deposit, at the option of the bank; except in Wisconsin and Missouri,[3] where a bank is held to have no right to treat the proceeds of a collection as its own money, but must treat it as trust money in all cases; and except where the person for whom the collection was made ordered the bank "to collect and *remit*", this direction negativing the right to credit the proceeds on general account.[4]

When a deposit is made under an agreement between the depositor and a third person for whose benefit the deposit was made, known and assented to by the bank, that the deposit should be subject to a lien against property purchased by the depositor, the deposit is special to the extent of the lien.[5]

[1] § 185. Mayer *v.* Chattahoochee National Bank, 51 Ga. 325; Wharton *v.* Walker, 4 Barn. & C. 163; Cobb *v.* Becke, 6 Q. B. 930; Raban *v.* Cascade Bank, 33 Mont. 413, 84 Pac. 72 (1906); Brown *v.* First National Bank, 216 Mass. 298, 103 N. E. 780 (1914); Shopert *v.* Indiana National Bank, 41 Ind. App. 474, 83 N. E. 515 (1907); Elliott *v.* First National Bank, 105 Tex. 547, 152 S. W. 808 (1913); Ellis *v.* National Exchange Bank, 38 Tex. Civ. App. 619, 86 S. W. 776 (1905); Minard *v.* Watts, 186 Fed. 245 (1910), money deposited to await the final determination of litigation; Dodge *v.* State National Bank, 96 Ark. 65, 131 S. W. 65 (1910), proceeds of a discounted note.

[2] American National Bank *v.* Presnall, 58 Kan. 69, 48 Pac. 556 (1897).

[3] Butler County *v.* Boatmen's Bank, 143 Mo. 13, 44 S. W. 1047 (1897).

[4] See Hutchinson *v.* National Bank, 145 Ala. 196, 41 So. 143 (1906), where there were instructions for specific application of the proceeds.

[5] Fort *v.* First National Bank, 82 S. C. 427, 64 S. E. 405 (1908).

§ 186. **A Deposit is presumed to be General.** — "A deposit is general unless expressly made special" or specific.[1]

Or the circumstances are such as to imply that the deposit is not meant to be general, as where money is deposited enclosed in a box or bag, or sealed up.[2]

Trust Money

Wherever the bank has a right to mingle the funds deposited with its own and treat them as a debt due from it, even though the money may be trust property given to the bank on condition that it would pay a certain sum to the *cestui* during life, the deposit is general.[3] In the absence of evidence to show that it is the bank's duty, by agreement express or clearly implied, to keep the funds and their investment separate, it must be treated as a general deposit.[3a]

[1] § 186. Ward *v.* Johnson, 95 Ill. 215, 2 Ill. App. 261; Brahn *v.* Adkins, 77 Ill. 263; Neely *v.* Rood, 54 Mich. 134; Ruffin *v.* Commissioners, 69 N. C. 498; *In re* Franklin Bank, 1 Paige (N. Y.) 249; Nichols *v.* State, 46 Neb. 715, 65 N. W. 704 (1894); Alston *v.* State, 92 Ala. 124, 9 So. 732 (1890); Woodhouse *v.* Crandall, 99 Ill. App. 552 (1902); National Produce Co. *v.* Sewell, 121 Ga. 278, 48 S. E. 945 (1904); McGregor *v.* Battle, 128 Ga. 577, 58 S. E. 28, 13 L. R. A. (N. S.) 185, n. (1907); State *v.* Bickford, 28 N. D. 36, 147 N. W. 407 (1913); Butcher *v.* Butler, 134 Mo. App. 61, 114 S. W. 564 (1908); Officer *v.* Officer, 120 Iowa 389, 94 N. W. 947, 98 Am. St. Rep. 365, n. (1903); Miami *v.* Shutts, 59 Fla. 462, 51 So. 929 (1910); Citizens' State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064 (1914); Missouri Pac. Ry. Co. *v.* Continental National Bank, 212 Mo. 505, 111 S. W. 574, 17 L. R. A. (N. S.) 994 (1908); Schofield Mfg. Co. *v.* Cochran, 119 Ga. 901, 47 S. E. 208 (1904); Sears *v.* Emerson, 182 Ill. App. 522 (1913). See Hill *v.* Arnold, 116 Ga. 45, 42 S. E. 475 (1902); State *v.* Dickerson, 71 Kan. 769, 81 Pac. 497 (1905).

[2] Dawson *v.* Real Estate Bank, 5 Ark. 297.

When trustees deposit trust money in their own name as trustees, it must be presumed that the trustees intended the deposit to be special. Smith *v.* Fuller, 86 Ohio St. 57, 99 N. E. 214, 1913D Ann. Cas. 387, n. And where money is deposited in a bank to be forfeited if the terms of a contract are not complied with it is a special deposit. Hoskins *v.* Dougherty, 29 Tex. Civ. App. 318, 69 S. W. 103 (1902). See also, Carlson *v.* Kies, 75 Wash. 171, 134 Pac. 808 (1913); Missouri Pac. Ry. Co. *v.* Continental National Bank, 212 Mo. 505, 111 S. W. 574, 17 L. R. A. (N. S.) 994 (1908).

[3] Vail *v.* Newark Savings Inst., 32 N. J. Eq. 627 (1880); Schofield Mfg. Co. *v.* Cochran, 119 Ga. 901, 47 S. E. 208 (1904).

[3a] Woodhouse *v.* Crandall, 99 Ill. App. 552 (1902); Troike *v.* Cook County Sav. Bank, 127 Ill. App. 413 (1906).

But funds deposited in trust for a special purpose are none the less trust funds even when they are mingled with the general funds of the bank. Mitchell *v.* Bank of Indianola, 98 Miss. 658, 54 So. 87 (1910).

"Clerk"

(*a*) The addition of the word "clerk" to the name of the depositor does not change it from a general to a special deposit, or alter the liability of the bank.[4]

Public Deposit

A deposit by a clerk of a court under its order, and not kept separate from the other funds of the bank, is general, and the clerk is not preferred to other creditors of the bank in case of its failure.[5]

So where the deposit is by a judge of probate, although the latter is responsible if loss occurs by reason of the general deposit.[5a]

A general deposit of school district funds by its treasurer is not within his power and the deposit does not become general.[5b]

In Iowa a school treasurer is not forbidden by law to deposit school funds in his own name as treasurer and he is not entitled to a preference upon the failure of a bank containing money so deposited by him.[5bo]

In Arkansas a county treasurer may, by authority of statute (Kirby's Digest, sec. 1990), make a general deposit of the public funds in an incorporated bank.[5ba]

Money deposited by a board of education and a library commissioner with the expectation of receiving interest on daily balances does not become a trust fund so as to entitle them to a preference.[5bb]

In Mississippi money deposited in a bank by a tax collector is a trust fund, and he is preferred to other creditors in case of the insolvency of the bank.[5bc] The same is true in regard to money

[4] McLain *v.* Wallace, 103 Ind. 562, 5 N. E. 911 (1885).

[5] Otis *v.* Gross, 96 Ill. 612 (1880); *In re*, Nichols, 166 Fed. 603 (1909), deposit by town supervisor; Clisby *v.* Martin, 150 Ala. 132, 43 So. 742, 124 Am. St. Rep. 64 (1907), deposit by the register; Retan *v.* Union Trust Co., 134 Mich. 1, 95 N. W. 1006 (1903), deposit by clerk or register.

[5a] Alston *v.* State, 92 Ala. 124, 9 So. 732 (1890).

[5b] State *v.* Midland State Bank, 52 Neb. 1, 71 N. W. 1011 (1897).

[5bo] Brown *v.* Sheldon State Bank, 139 Iowa 83, 117 N. W. 289 (1908).

[5ba] Warren *v.* Nix, 97 Ark. 374, 135 S. W. 896 (1911). See *In re* Salmon, 145 Fed. 649 (1906).

[5bb] Board of Education *v.* Union Trust Co., 136 Mich. 454, 99 N. W. 373 (1904).

[5bc] Fogg *v.* Bank of Friar's Point, 80 Miss. 750, 32 So. 285 (1902); Fidelity etc. Co. *v.* First State Bank, 103 Miss. 91, 60 So. 47 (1912); Green *v.* Cole, 98 Miss. 67, 54 So. 65 (1910).

deposited by a (sheriff) tax collector.[5bd] And the preference is assignable by the officer to one who advances money to enable him to make his official settlement.[5be]

In Oklahoma a deposit of county funds made by a county treasurer does not pass title to the bank and the county is preferred to the other creditors if it can trace its money into the general mass turned over to the receiver.[5bf]

A deposit of county or town funds by its treasurer is a special deposit and the debt is due the municipality, which, upon the insolvency of the bank, is entitled to a preference.[5bg]

In Montana a county treasurer may make a general deposit of public funds in a bank if he takes a bond in double the amount of the deposit. If the funds are deposited without taking a bond they are special funds and may be collected from the receiver of the bank if traceable into his hands.[5bh]

Where a clerk of the U. S. District Court deposited, as a unit, moneys received by assignees in bankruptcy, to be drawn on checks of the court, he failed to deposit all the money received by him. The bank was not bound to open a separate account for each assignee and was not liable for unpaid checks after the fund was exhausted.[5c]

Not a Specific Deposit if to be Credited on General Account, though a Specific Direction be Added

(*b*) Where F. sent a check with the instruction, "Credit our account, and charge us our note due the 4th inst.", and the check was collected, credited, and a matured note of F.'s payable at the bank was paid on the 3d, leaving insufficient funds to pay the one presented on the 4th, it was held that this was not a specific deposit. The direction to "Credit our account" made it a general deposit (and the second clause was supererogation, as the bank would have authority to pay the note of the 4th any way), and the bank from the time of crediting the sum

[5bd] Metcalf *v.* Merchants' etc. Bank, 89 Miss. 649, 41 So. 377 (1906).

[5be] Commercial Bank *v.* Hardy, 97 Miss. 755, 53 So. 395 (1910).

[5bf] Watts *v.* Board of Commissioners, 21 Okla. 213, 95 Pac. 771, 16 L. R. A. (N. S.) 918, n. (1908).

[5bg] Lockwood *v.* Lockwood, 68 S. C. 328, 47 S. E. 441 (1903).

[5bh] Yellowstone County *v.* First Trust etc. Bank, 46 Mont. 439, 128 Pac. 596 (1912).

[5c] State National Bank *v.* Reilly, 124 Ill. 464, 14 N. E. 657.

on general account held it subject to checks or notes in the order of presentment.[6]

Perhaps the decision was very just under all the circumstances, but if the substance is to be looked to rather than hair-line distinctions, it would seem that the language used by the depositor as clearly indicated his intent to apply the money sent toward payment of the note of the 4th, as though he had said, "We send this check to pay our note of the 4th inst.", in which case there would have been no doubt that the bank could use the money for that purpose only. It has often been held that any specific directions regarding the payment of a note, or appropriation of a deposit, must be regarded.[7]

§ 187. **Deposit of Paper.** — When checks, notes, or other negotiable paper are deposited, the question whether they constitute a general deposit or a specific deposit for collection is one of some difficulty. The best opinion is, that checks on the depositary credited as cash form a general deposit, in the absence of agreement or usage to the contrary, and that other paper credited as cash is also received on general deposit, subject to the right of the bank to cancel the credit if the paper is dishonored without its fault (there is disagreement on this point). If paper is credited as paper, it is received as a specific deposit for collection. This subject is discussed under the head of "Title to Deposits", § 565. If the title passes to the bank, a general deposit arises; if not, a specific or special one, according as the bank is merely to keep and return the identical paper, or is to do some further act in respect to it.

§ 188. **Change of Deposit from One Kind to Another.** — By agreement or order, a special deposit may be changed into a general or specific deposit, or a general into a specific or special; or a specific deposit may become a special or a general deposit, as when paper is collected, and the bank credits the proceeds to the depositor on general account.[1]

[6] Etna National Bank *v.* Fourth National Bank, 46 N. Y. 82.

[7] Judy *v.* Farmers & Traders' Bank, 81 Mo. 404; Wilson *v.* Dawson, 52 Ind. 513; Egerton *v.* Fulton National Bank, 43 How. Pr. (N. Y.) 216; Wetherell *v.* O'Brien, 140 Ill. 146, 29 N. E. 904.

[1] § 188. Howard *v.* Roeben, 33 Cal. 399 (special to general); Com. National Bank *v.* Henninger, 105 Pa. St. 500 (general to special or specific); Chiles *v.* Garrison, 32 Mo. 475; State *v.* Grills, 35 R. I. 70, 85 Atl. 281 (1912).

Giving notes for the amount of deposits does not make them special. Turner *v.* Farmers' Bank, 148 Ky. 692, 147 S. W. 435 (1912).

Where a bank paid money for C. under agreement that C. would apply his balance on the consequent debt to the bank, and give his note, which he did, it was held that this appropriation of the deposit put it out of the reach of C. by checking, or of his creditors by attachment, and on failure of the bank it should be deducted from the amount of the claim on the note against C.[2]

So when a depositor (D.) orders his bank (A.) to remit money for him to another bank (B.), A. acts as agent in transmitting; and as soon as the money on deposit in A. is appropriated by it on the order, it becomes a specific deposit as to A., the title being in D., and although A. deposits the money in B. to its own credit, the fund may be claimed by D. against the creditors of A. upon its insolvency.[3]

Where B. drew part of an existing deposit, taking a certificate for the remainder, and asking that said remainder be put in a separate envelope and held as a special deposit, the promise of the bank to do this will not change the fund from general to special unless the separation is actually made.[4]

[2] Chase *v.* Petroleum Bank, 66 Pa. St. 169.

[3] St. Louis *v.* Johnson, 5 Dill. 241; Farley *v.* Turner, 26 L. J. Ch. (N. S.) 710. See Hutchinson *v.* National Bank, 145 Ala. 196, 41 So. 143 (1906).

[4] Bayor *v.* American Trust and Savings Bank, 157 Ill. 62, 41 N. E. 622.

CHAPTER XIV

SPECIAL DEPOSIT

§ 190, DEFINITION. §§ 182, 183.

§ 182. How distinguished from general and specific deposits.

§ 191. POWER. § 48.
Bank has inherent power to receive. (Doubted in New York.)

§ 192. ANYTHING may be deposited specially that the bank chooses to receive, and the identical thing deposited, together with its accumulations, and all profits arising from it, must be returned to the depositor, or to one properly authorized to receive it, and if the bank is lacking in due care whereby the deposit is lost, damaged, or delivered to an improper person, it is liable to the depositor. §§ 184, 565, 567, 568 *b*.

§ 193.

§ 204.

§ 194.

§ 202.

§ 204.

§ 194. THE MEASURE OF CARE a bank must bestow in case of a special deposit is the subject of conflict.

§§ 194, 195. The best rule is that a bank is bound to ordinary care, and no more.

§§ 198, 199. Sometimes it is said that only gross negligence equivalent to fraud will make the bank liable, and that if it gives the same care as to its own bank property no fault can be imputed.

§ 196.

§ 194. Sometimes gross negligence is taken as the standard, and (2) defined as the lack of even so much care as the most inattentive person of common sense exercises in his own affairs.

§ 197. And, again, gross negligence is nominally accepted as the test, but the court defines it as lack of ordinary care.

§§ 195, 199. SOME THINGS SEEM CERTAIN amid the confusion.
(*a*) A bank is not liable for a special deposit stolen without its fault.

§§ 201, 202, 204. (*b*) Nor for a loss by the wilful act of an officer beyond the sphere of duty. § 102 *e*, *h*.

§ 196 *et seq.* Bad faith, or less care than the bank takes of its own like property will everywhere make it liable.

§ 200. No more than ordinary care is ever required unless a

§ 203. SPECIAL AGREEMENT is entered into by the bank, which may enlarge its contract.

§ 203. Unauthorized representations of an officer, unknown to the directors, cannot enlarge the contract.
§ 205. Interest on Special Deposit.

§ 190. **Definition.** — A special deposit, so called, is the placing of something in the charge or custody of the bank, of which specific thing restitution must be made.[1] Or the phrase may be applied to the thing deposited.

§ 191. **Power.** (See § 48.) — It has generally been considered that taking a special deposit falls within the general scope of the banking business, although no express power is conferred by the charter of the bank, or by the organic law, so to do. It has been regarded as an incident to the general function of the institution.[1]

But the power of the bank to make contracts of bailment of this nature has been questioned in some cases. Whether the receipt of goods and securities on deposit for safe keeping is within the implied powers of national banks organized under the Act of Congress of 1864, c. 106, is a *quære* by the New York Court of Appeals. But it is said to be certain that such a function is not ordinarily or necessarily appurtenant to a part of the general banking business which such associations are authorized by their organic law to conduct; that accordingly the cashier has no power to enter into such a contract of bailment with any person on behalf of the bank without some special authority; that in the absence of proof that the cashier had received such authority from the directors, or that they had ever sanctioned or had knowledge of such contract, or that it was the habit of the bank to enter into such undertakings, or that other national banks were accustomed to receive deposits of like character under like circumstances, it was unquestionable that the authority so to

[1] § 190. Dawson *v.* Real Estate Bank, 5 Pike 283; Story on Bailments, § 88; Keene *v.* Collier, 1 Metc. (Ky.) 417; State *v.* Clarke, 4 Ind. 316; Alston *v.* State, 92 Ala. 124, 2 So. 732 (1890); State *v.* Bickford, 28 N. D. 36, 14 N. W. 407 (1913); First National Bank *v.* Henry, 159 Ala. 367, 49 So. 97 (1906); Warren *v.* Nix, 99 Ark. 374, 135 S. W. 896 (1911); Doeph *v.* Cross, 153 Iowa 289, 133 N. W. 669 (1911); Officer *v.* Officer, 120 Iowa 389, 94 N. W. 947, 98 Am. St. Rep. 365, n. (1903); Schofield Mfg. Co. *v.* Cochran, 119 Ga. 901, 47 S. E. 208 (1904).

[1] § 191. Foster *v.* Essex Bank, 17 Mass. 479; Marine Bank of Chicago *v.* Chandler, 27 Ill. 525; Scott *v.* National Bank of Chester Valley, 72 Pa. St. 471; Lancaster Bank *v.* Smith, 12 P. F. Smith (Pa.), 54; Caldwell *v.* National Mohawk Valley Bank, 64 Barb. (N. Y.) 333.

A savings bank may receive a special deposit. Sherwood *v.* Home Savings Bank, 131 Iowa 528, 109 N. W. 9 (1906).

contract did not reside in the cashier, and such a contract, made by him, was *ultra vires*.[2] The bank receiving such an unauthorized bailment, being at best a mere gratuitous bailee, is liable only for gross negligence.[3]

It has been said that, though the act of the cashier in receiving special deposits cannot alone bind the bank, yet if the directors have knowledge of his action in this respect, and do not interfere or object to it, or if it is the established custom of the bank, then the bank will be bound by the cashier's receipt of the property.[4]

§ 192. **What may be deposited Specially.** — Anything whatever, which the bank may consent to receive in charge, may be the subject of a special deposit. Ordinarily, a deposit of money, at least if it be the current money of the country or State where the deposit is made, will be assumed to be a general deposit, unless the contrary is at the time directly notified, or in some shape distinctly implied, so that the bank could not reasonably misunderstand the depositor's intent. Thus, if a "sealed packet, bag, box, or chest" be deposited, though it contain ordinary current money, yet the manner and condition of the delivery shall suffice to inform the bank that the deposit is designed to be special, and not general. Neither does it matter what may be the actual value of the property deposited, or what that value may become during the period of deposit.

If bills or notes be deposited which are partially depreciated, and which continue to depreciate even to the point of worthlessness, yet the bank is still bound to restore them specifically to the depositor, whose rights of ownership are not affected by the value of the property.[1] These cases show that it has been thus held, even where the deposit was of "Confederate money", and of the so-called "Cotton money", current in the revolted States during our Civil War. The illegality and wrongfulness attendant upon the original issue and subsequent using of such money was not sufficient excuse to exonerate the bank from returning a special deposit

[2] First National Bank *v.* Ocean National Bank, 60 N. Y. 278; Wiley *v.* First National Bank of Brattleboro, 47 Vt. 546; Lloyd *v.* West Branch Bank, 15 Pa. St. 172. But see Turner *v.* First National Bank of Keokuk, 26 Iowa 562, which, by implication, would sustain a contrary view, since it seems to recognize a claim for a special deposit as a debt of the bank.

[3] First National Bank *v.* Ocean National Bank, 60 N. Y. 278.

[4] First National Bank *v.* Graham, 79 Pa. St. 106.

[1] § 192. Dawson *v.* Real Estate Bank, 5 Pike 283; Green *v.* Sizer, 40 Miss. 530. And see Maynand *v.* Newman, 1 Nev. 271.

of it *in specie*. But other cases are to a contrary purport upon this precise point.[2]

§ 193. **The very Thing and its Accumulations or Profits must be returned.** — After the passage of the Legal Tender Acts, so called, it was held, in Pennsylvania and Louisiana, that a deposit of so much gold coin, for which a certificate of deposit was returned, could yet be repaid in treasury notes.[1] It was regarded as a general deposit of money, not as a special deposit of specific coins. In Wisconsin it was less justifiably held that a deposit of coin as collateral for a loan — which is, in fact, at least for the purposes involved in this discussion, a special deposit of that coin — could be discharged by the return of the same nominal amount in the legal tender treasury notes of the United States.[2] In Indiana it was properly held, on the contrary, that where a special deposit of gold coin, partly of the United States and partly foreign, had been converted by the bailee, the bailor should be allowed to recover the real *value* of the amount in the treasury notes, as contradistinguished from the nominally equivalent sum.[3] The bailee must deliver to the bailor the profit accruing from the special deposit.[4] No difference is recognized between a bank note and gold coin in payment of a debt, but when a bailee of specific coin has, in violation of his duty, sold it for a premium, he cannot hold the profit and pay the bailor in bank notes equal nominally to the coin. No one has a right to make a profit by violation of his legal duty, and the law will not allow him to retain it if he has.[5]

§ 194. **Liability of the Bank for a Special Deposit. — General Review of the Subject.** — As to the measure of responsibility of the bank in the case of a special deposit, a decision may be found for any desired standard.

Great Negligence Held to be Fraud

(1) Some cases say that the bank as a gratuitous bailee is only bound to such care as is consistent with good faith, holding that gross negligence and fraud are one and the same, and that it

[2] See, *contra*, Nelligan *v.* Citizens' Bank of Louisiana, 21 La. Ann. 332; Foster *v.* Bank of New Orleans, *id.*, 338.

[1] § 193. Sandford *v.* Hays, 52 Pa. St. 26; Gumbel *v.* Abrams, 20 La. Ann. 568; and see Thompson *v.* Riggs, 5 Wall. 663, 18 L. ed. 704.

[2] Warner *v.* Sauk County Bank, 20 Wis. 492.

[3] Bank of the State *v.* Burton, 27 Ind. 426.

[4] Story on Bailment, §§ 122, 123, 269.

[5] Bank of the State *v.* Burton, 27 Ind. 426.

is sufficient if the bailee exercises the same care of the deposit as of his own like goods.[1] The vast weight of authority is against this.[2]

Gross Negligence Lack of Slight Care

(2) Other cases hold that gross negligence is the test, and that there is a shade of difference between gross negligence and fraud: a man might leave a purse of gold on the table of a hotel, and although it would be gross carelessness it would not be fraud. These cases define gross negligence to be lack of such care as the least attentive persons of common sense take of their own affairs.[3] The bank, as a gratuitous bailee, is liable only for gross negligence, and for the lack of that "care which the most inattentive persons take."[4]

Gross Negligence Held Lack of Ordinary Care

(3) Again it is held that a bank is only responsible as gratuitous bailee for gross negligence, but that gross negligence is lack of ordinary care.[5] Such a ruling, though doing justice between the parties, introduces confusion into the standards of the law by confounding negligence and gross negligence. There are three degrees of diligence, — great, ordinary, and slight; — and three corresponding degrees of negligence, — slight negligence, or lack only of great care; simple negligence, or lack of ordinary care; but above slight care; and gross negligence, or lack even of slight care, or such as persons of common sense, but very little prudence, take of their own concerns.

The True Rule, Ordinary Care

(4) The true rule seems to be that in the absence of special agreement the bank is bound to exercise ordinary care, and no more, in keeping a special deposit.[6]

Loss caused by the negligence of A. should be borne by A.;

[1] § 194. Essex Bank case below, and Jones on Bailment, 10, 46, 119.

[2] Story on Bailment, § 22.

[3] Vaughan *v.* Menlove, 3 Bing. N. C. 468; Tompkins *v.* Saltmarsh, 14 Serg. & R. (Pa.), 275.

[4] De Haven *v.* Kensington National Bank, 81 Pa. St. 95.

[5] First National Bank *v.* Ocean National Bank, 60 N. Y. 295.

[6] First National Bank *v.* Zent, 39 Ohio St. 105; Sherwood *v.* Home Savings Bank, 131 Iowa 528, 109 N. W. 9 (1906); Barnett *v.* First National Bank, 148 Iowa 667, 127 N. W. 1012 (1910).

the development of prudence and the repression of negligence is consciously or unconsciously one of the great objects of the law; and whether for reward or not one undertakes to do a certain thing, he should be held to ordinary care in doing it, except in special cases, just *as every man is held responsible to others for loss caused to them by lack of ordinary care on his part in the conduct of his own affairs, even where there is no relation of contract at all*; otherwise the risk would be run of throwing loss upon prudence rather than imprudence, and developing and sending down to future generations qualities detrimental to social life, thus failing to carry out the mission of the law, the purifying of the blood of society.

It is a question of negligence between the bailor and bailee. If the bailor knows the character of a man, and gets him as a favor to keep goods for the bailor, the latter may well be held to be entitled to expect only such care as he knows the bailee is in the habit of giving to his own affairs. Or if A. urges B. to act as a gratuitous bailee, B. not holding himself out in such a character, it might be argued that A. should be held to adopt B. as he is, much as he would adopt a shovel or a steam-engine, within the limits of good faith, though it is by no means certain that in any case where B. consents to act and A. is ignorant of his character there should be any yielding of the rule requiring ordinary care. But *when* B. *holds himself out* as willing to keep deposits, and as having facilities for that purpose, surely A. cannot be negligent in taking advantage of the offer; and if B. should be negligent and loss follow, the detrimental conduct from which such loss flows is clearly B.'s alone, and he should suffer. Even if the question of consideration is considered of importance, it cannot be doubted that an institution whose avowed object is money making would never pursue the business of receiving deposits if it did not consider such dealings advantageous to itself. The drawing of paying business by this sort of accommodation is as solid a reason for receiving deposits as a direct reward; moreover the mere entering upon any trust is deemed in the law a sufficient consideration for the contract to perform the duties of the trust in a proper manner.[7] See § 215.

[7] Sherwood *v.* Home Savings Bank, 131 Iowa 528, 109 N. W. 9 (1906). If a banker undertakes to invest money for his depositor, and collect the same he must exercise ordinary care and diligence. Watson *v.* Fagner, 208 Ill. 136, 70 N. E. 23 (1904); and it seems that if the money is to be

Two Things Certain on the Cases

(5) On the cases only two things seem to be certain in this matter. 1st. The bank will be everywhere held liable for loss arising from bad faith of its officers in the sphere of their duties. 2d. A bank will nowhere be held to more than ordinary diligence in respect to a special deposit, nor for a theft or other wilful act of an officer out of the line of his employment.

These are the limits. Within them the States range in procession.

§ 195. **Cases upon the Bank's Liability for Special Deposits.** — A recent New York case contains a very elaborate discussion concerning the liability of banks for special deposits which are stolen while in their custody. The deposit in this instance consisted of a parcel of bonds, left with the teller. They were put into the safe where the bank's own securities were kept; but the safe was accessible to any person entering the bank; the safe door was sometimes left open; and the interior of the safe was not always within view of any officer of the bank. There was evidence to show that the theft probably took place in the daytime by some one coming in from the street. The evidence justified the finding of gross negligence. Property of the bank also was stolen at the same time. But the court said that this was not conclusive that the bank was not guilty of gross negligence, and consequently liable.[1]

Where the cashier places his indorsed note in the private envelope of a depositor, in the vault of the bank, as collateral security for his individual note to the depositor, the bank is not liable for failure to present the note for payment and to notify the indorser of non-payment. The note being merely a special deposit with the bank it is constructively in the depositor's possession.[2]

Gross Neglect Measured by the Care the Depositary Takes of his Own Goods. Special Deposit Act outside of Duty

§ 196. Banks frequently receive special deposits from their customers gratuitously, accepting no pay and deriving no benefit

applied to the payment of stock the bank, though acting gratuitously, must exercise the care that is customary with banks under like circumstances. Foran *v.* Royal Bank, 141 App. Div. 548 (1910), 126 N. Y. S. 575.

[1] § 195. Pattison *v.* Syracuse National Bank, 80 N. Y. 94.

[2] Bohl *v.* Carson, 63 Fed. 26.

from the act, which is done solely for the depositor's accommodation. Assuming that the bank has authority to enter into such an undertaking, it is at best a naked bailment, and the bank is bound only to keep the property with the same care with which it keeps its own property of the like description. It is responsible only for gross negligence, like any other bailee without reward.[1] It need keep no further supervision over the officers who have direct charge and control of it than it keeps over the same officers having the same charge and control of its own property of the same kind.[2] So if the property be placed in the vaults of the bank, together with its own similar property, and be thence stolen by the officer who has charge of the vaults, the bank is not liable to the depositor. "The bailee will be answerable only for *gross negligence, which is considered equivalent to a breach of faith;* as every one who receives the goods of another in deposit impliedly stipulates that he will take some degree of care of them. *The degree of care which is necessary to avoid the imputation of bad faith is measured by the carefulness which the depositary uses toward his own property of a similar kind.* For although that may be so slight as to amount even to carelessness in another, yet the depositor has no reason to expect a change of character in favor of his particular interest; and it is his own folly to trust one who is not able or willing to superintend with diligence his own concerns." In this case the special deposit was a cask containing gold coin, which was fraudulently taken by the cashier and clerk of the bank. The bank was declared not liable, because the theft was a private act. "If the cashier had any official duty to perform relating to the subject," said the court, "it was merely to close the doors of the vault when banking hours were over, that this, together with other property there should be secure from theft. He cannot, therefore, be considered in any view as acting within the scope of his employment when he committed the villany; and the bank is no more answerable for this act of his than it would be if he had stolen the pocket-book of any person who might have laid

[1] § 196. Chattahoochee National Bank *v.* Schley, 58 Ga. 369. See People's National Bank *v.* Wheeler, 21 Okla. 387, 96 Pac. 619, 21 L. R. A. (N. S.) 816, n. (1908).

When diamonds which were left with a bank as a special deposit were lost through the gross negligence of the employees of the bank, the bank was liable therefor. First National Bank *v.* Tevis, 29 Okla. 714, 119 Pac. 218 (1911).

[2] First National Bank *v.* Ocean National Bank, 60 N. Y. 278.

it upon the desk while he was transacting some business at the bank." [3]

§ 197. **Gross Negligence** "is incapable of precise definition, and its application and use may lead, in some cases, to results unsatisfactory; but that comes as directly from the nature and extent of the duty in the particular case, as from the phrase by which a breach of the duty is expressed. What constitutes gross negligence, that is, such want of care as would charge a bailee for loss, must depend very much upon the circumstances to which the term is to be applied. It has been defined to be the want of that ordinary diligence and care which a usually prudent man takes of his own property of the like description. This definition is given by a reference to the degree of care, rather than the degree of negligence, which may be the easier and more intelligible mode of defining the extent of the obligation, and the measure of duty assumed. *Ordinary care as well as gross negligence, the one being in contrast with the other*, must be graded by the nature and value of the property, and the risks to which it is exposed. A depositor of goods or securities for safe keeping with a gratuitous bailee, can only claim that diligence which a person of common sense, not a specialist or expert in a particular department, should exercise in such department." [1]

Banks not Bound to Provide against Unknown Risks

"Independent acts of negligence, disconnected with the loss, were not properly admissible in evidence. The defendant was not chargeable with negligence or want of care for not acting upon facts or circumstances not coming to the knowledge of its directors or officers. Facts not brought home to them, tending to show that the property was exposed to loss from some unusual cause, to some peril growing out of peculiar circumstances, were not admissible in evidence against the defendant. The bailee was only called upon to take such care as became necessary to protect *it against risks known to it, or of which it had notice*. There was great latitude in the evidence on the part of plaintiffs. . . . The purpose and end was to show that the place of deposit was peculiarly and extraordinarily exposed to perils from robbers at the time, calling

[3] Foster *v.* Essex Bank, 17 Mass. 479; Scott *v.* National Bank of Chester Valley, 72 Pa. St. 471; but see Leach *v.* Hale, 31 Iowa 69.

[1] § 197. First National Bank *v.* Ocean National Bank, 60 N. Y. 295.

for more than the usual cautions from the bailee. This was competent, so far as facts and circumstances proved to exist were communicated to the officers of the bank, but no farther." [2]

Bank must Exercise Ordinary Care in Keeping Special Deposit

§ 198. "It is usually stated that a bailee who is to receive no reward is liable only for gross negligence, and some of the cases hold that such a bailee is responsible only for want of that care which is taken by the most inattentive. But that rule cannot be applied to all cases of bailment without reward, *for when securities are deposited with persons accustomed to receive such deposits, they are liable for any loss occurring through the want of that care which good business men would exercise in regard to property of such value.* This was the degree of care required of the bank in this case. Were the bonds lost for the want of such care? They were demanded, . . . and the only excuse given for not delivering them, as stated in the answer of the bank, was, that 'the said bank, not having any such bonds in its possession, did not deliver any to the plaintiffs.' No explanation was offered, and no reason given, for the bonds not being in the possession of the bank. We hold that under these circumstances the proof of demand and the refusal to deliver was sufficient evidence that the bonds had been lost by the gross negligence of the bank." [1]

Ordinary Care the Limit. Own Care Standard Denied

§ 199. In England, it has been held that where securities are deposited by a customer with his banker for safe keeping, or for the purpose of having the interest thereon collected for him by the banker, the banker is not liable if the securities be stolen, unless the loss has been caused or aided by his gross or contributory negligence.[1] The court said: "It is clear that the bank in this case was not bound to more than ordinary care of the deposit intrusted to it, and that the negligence for which alone it could be made liable would have been the want of that ordinary diligence which men of common prudence generally exercise about their own affairs. There was an entire failure of evidence of the want of that ordinary care which the bank was bound to bestow on the plaintiff's deposit. The defendant's evidence added to the plain-

[2] *Ibid.* [1] § 198. First National Bank *v.* Zent, 39 Ohio St. 105.

[1] § 199. Giblin *v.* M'Mullen, 2 L. R. P. C. 317, 38 L. J. P. C. 25.

tiff's case the important fact, that in the strong-room in which the plaintiff's debentures were kept there were, beside the boxes of other customers, bills, securities, and specie, the property of the bank, to a very considerable amount. *It may be admitted not to be sufficient to exempt a gratuitous bailee from liability that he keeps goods deposited with him in the same manner as he keeps his own, though this degree of care will ordinarily repel the presumption of gross negligence.* But *there is no case which puts the duty of a bailee of this kind higher than this*, that he is bound to take the same care of the property intrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description. This was in effect the question left to the jury in Dorman *v.* Jenkins, where Lord Denman told them that it did not follow from the defendant's having lost his own money at the same time as the plaintiff's, that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own; and he added that the fact relied upon was no answer to the action, if they believed that the loss occurred from gross negligence." [2]

Bank not Bound to More than Ordinary Care

§ 200. A bank is not bound to use more than ordinary prudence in the care of a special deposit, and it is to be the general tendency of the courts to be satisfied with no less than ordinary care.[1]

The bank must keep a special deposit under the same safeguards afforded to its own like property but merely leaving the safe door open during business hours, or leaving the bank at noon in charge of only one person, is not even negligence, let alone gross negligence.[2]

Wilful Act of Officer beyond Duty does not Make Bank Liable

§ 201. When the president for his own purposes hypothecates bonds that are held by the bank on special deposit, and they are lost, the bank cannot be held unless the officers knew of the president's conduct, or were guilty of gross neglect in the discharge

[2] Giblin *v.* M'Mullen, 2 L. R. P. C. 317, 38 L. J. P. C. 25.

[1] § 200. Griffith *v.* Zipperwick, 28 Ohio St. 388; First National Bank *v.* Zent, 39 Ohio St. 105; Levy *v.* Pike, 25 La. Ann. 630; Hills *v.* Daniels, 15 *id.*, 280; First National Bank *v.* Ocean National Bank, 60 N. Y. 295.

[2] Whitney *v.* First National Bank, 55 Vt. 154.

of their duties, and this neglect opened the door to the fraud, or lost opportunities of recovering the property. A bank is not liable by reason of the crime or any wilful act of an officer out of the course of his duty.[1] (§ 102 *e*, *h*.)

If a bank is guilty of no negligence in the selection or supervision of its officers it cannot be held for property stolen by them.

A bank is not liable for the act of its officer outside of his sphere of duty, as every embezzlement is, *e.g.* in case of breaking open a cask of gold coin on special deposit in the bank, and taking the money. It was not the duty of the officer as acting for the bank to open the cask; he was going beyond his authority, and the bank was not answerable for his acts.[2]

Acts beyond the Officer's Duty. Gross Neglect

§ 202. When bonds were left for safe keeping and were stolen by the teller, the court said: "Being a bailment merely for safe keeping for the benefit of the bailor, and without compensation, it is evident the dishonest act of the teller was in no way connected with his employment. So long as the bank was ignorant of the dishonesty of the teller, and trusted him with its own funds, confiding in his character for integrity, it would be a harsh rule that would hold it liable for an act not in the course of business of the bank, or of the employment of the officer. There was no undertaking to the bailor that the officers should not steal. Of course, there was a confidence that they would not, but not a promise that they should not. . . . Nothing short of a knowledge of the true character of the teller, or of reasonable grounds to suspect his integrity, followed by a neglect to remove him, can be said to be gross negligence, without raising a contract for care higher than a gratuitous bailment can create."[1]

The fact that for two years he has falsified the books of the bank without being discovered was held, in the cited case, not to be such negligence as to render the bank liable. For the negligence constituting the ground of liability must be such as enters into the cause of the loss; but the loss here was chargeable to the immediate act of dishonesty of the teller, not to the fact that he had purloined the bank's funds or falsified the bank's books.

[1] § 201. First National Bank of Allentown *v.* Rex, 89 Pa. St. 308.

[2] Foster *v.* Essex Bank, 17 Mass. 479; Ray *v.* Bank, 10 Bush (Ky.) 344; Finucane *v.* Small, 1 Esp. R. 315; Giblin *v.* M'Mullen, 2 L. R. P. C. 317.

[1] § 202. Scott *v.* National Bank, 72 Pa. St. 471.

Robbery

A bank is liable for loss of a special deposit by robbery, there being neither fraud nor gross negligence imputable to it.[2]

More proof must be given by the owner than merely that the bonds were stolen, or he cannot recover.[3]

When the plaintiff's evidence fails to exclude the possibility of loss by other means than the negligence of the bank, as where the evidence tends to show that the bank did use due care, and there is no evidence of negligence in the selection of cashier or of clerks, and the only evidence of negligence is that provided by the mere fact of loss, although the presumption of innocence will protect the cashier and clerks from a charge of theft, yet it will not " sustain the burden of proof in an action against the bank for negligence." [4]

§ 203. **Varying the Contract by Agreement.** — If any special arrangement should be entered into by which the bank should be enabled to derive any advantage or profit from the receipt and custody of the deposit, or if it should accept pay for the care of the same, then its duties would at once be changed to those of an ordinary bailee for hire. Then, as in the supposed instance of robbery or embezzlement by one of its own officers, it would be no exoneration from liability to show that the same care had been taken of this as of the bank's funds, and that the same officer had in the same way plundered the bank itself. The corporation

[2] Whitney *v.* First National Bank, 55 Vt. 154 (1882). See Gerrish *v.* Muskegon Savings Bank, 138 Mich. 46, 100 N. W. 1000 (1904).

When an employee of the bank places bonds of a town in the safe of a bank for his own personal accommodation with knowledge of a rule that the bank would not act as the custodian of negotiable securities and that such securities were at the owner's risk, the bank is not a bailee of the securities and is not liable when the securities are stolen. Fairfield *v.* Southport National Bank, 80 Conn. 92, 67 Atl. 471 (1907).

[3] Wylie *v.* Northampton Bank, 15 Fed. Rep. 428.

[4] Smith *v.* First National Bank, 99 Mass. 605. It seems to be law that in trover proof of demand and refusal will throw the burden on the defendant, to show a good excuse for refusal to deliver; but that in assumpsit or action on the case the burden is on the plaintiff to make out negligence. See Story on Bailments, § 213. This does not commend itself very strongly, for, the facts being the same, the form of action should not be allowed to shift the burden. The substantial and common sense fact is, that the defendant, having failed to deliver, should justify himself, especially as the facts which can accomplish that object are peculiarly within his own knowledge. See also Merchants' Bank *v.* Carhart, 95 Ga. 394, 22 S. E. 628 (1894).

would still be held to make good the bailor's loss. But it is clear that some such direct advantage, operating by way of consideration for the assumption of increased responsibility, must accrue to the bank to place it under such an obligation. An express stipulation or acknowledgement, given by the cashier in writing, to the effect that the property has been received by the bank "for safe keeping," does not make the transaction other than a naked bailment, as above stated.[1]

(*a*) Showing to the depositor the arrangements of the bank for safe keeping of deposits is not a representation increasing the obligation or liability of the bank.[2] But representations may be made to induce parties to deposit, which may call for greater care on the part of the bank, or by agreement the bank may even become an insurer of the deposit, as where a written promise was given to return bonds on demand or pay their value.[2]

Representation of Cashier Unauthorized and Unknown to Board, Cannot Enlarge the Contract

(*b*) A., at the solicitation of the cashier of a bank, deposited with it, for safe keeping, certain bonds, taking a receipt therefor, stating that they were received "for deposit in the vault of this bank at the risk of the depositor." *Held*, that, in absence of any evidence that the bank was accustomed to receive bonds for safe keeping, except owner's risk, or that the directors had knowledge that bonds were left at the instance, request, or solicitation of the cashier, evidence of the latter's representations at the time of the deposit as to the safe keeping of the bonds was not sufficient to change the effect of the receipt so as to affect the bank.[3]

§ 204. **Delivery of Special Deposit.** — A bank is liable for gross negligence in keeping or delivering a special deposit, but if the person to whom it negligently delivers the deposit, without requiring evidence of any authority on his part to receive it, was nevertheless unknown to the bank, really authorized by the depositor to receive it, the bank is discharged.[1]

[1] § 203. Foster *v.* Essex Bank, 17 Mass. 479.
[2] Hale *v.* Rawallie, 8 Kan. 136; Maury *v.* Coyle, 34 Md. 235.
[3] Comp *v.* Carlisle Deposit Bank, 94 Pa. St. 409 (1880). See § 103.
[1] § 204. Chattahoochee National Bank *v.* Schley, 58 Ga. 369 (1877).

Delivery to Wrong Person

The bank was held liable where the teller delivered certain bonds, left as a special deposit, to a person calling himself by the same name as the bailor, but in fact not being the bailor; on the ground that the teller was guilty of gross negligence in not taking proper care to assure himself as to the identity of the stranger with the bailor.[2]

W. left securities with a bank for safe keeping, taking a receipt which stated that they would be delivered on its surrender. The bank delivered to W.'s husband, without requiring production of the receipt or of an order from W. *Held,* the bank was still liable to W.[3]

A bank is not liable for delivering special deposits to an agent who had authority to control them for certain purposes, unless it had notice of the revocation of his authority, or knew the use he was going to make of them, and that it was an unauthorized use.[4]

A sealed packet must be delivered to a magistrate upon a subpœna *duces tecum* requiring the banker to produce it.[5]

§ 205. **A Special Deposit is no Part of the Bank's Available Assets.** — As has been seen, a special deposit does not enter into the general funds of the bank, and form a part of its disposable capital. It is to be kept by itself, and specifically returned. Hence it follows that a bank cannot base any increase of issues or discounts upon such unavailable deposits. They are in no sense at its disposal, and it can in no manner (unless there be a special, extraordinary, and peculiar arrangement) reap any advantage or profit, direct or indirect, from the simple custody of them. They are not part of its moneys.[6] Whence it follows, that, if the

[2] Lancaster Bank *v.* Smith, 12 P. F. Smith (Pa.) 54.

When a bank accepts money and agrees to hold it subject to a lien it is liable for whatever has to be paid to protect the property from a judgment obtained in the lien proceedings, if it pays the money to the depositor. Fort *v.* First National Bank, 82 S. C. 427, 64 S. E. 405 (1908).

If a bank holding money in escrow to be paid to one of two parties in accordance with the terms of an agreement pays it to the one not entitled thereto it is liable to the other party. Citizens' National Bank *v.* Davisson, 329 U. S. 212, 57 L. ed. 1153, 33 Sup. Ct. 625 (1912).

[3] Ganley *v.* Troy City National Bank, 98 N. Y. 487.

[4] Walker *v.* Manhattan Bank, 25 Fed. Rep. 247 (1885).

[5] Rex. *v.* Daye (1908), 2 K. B. 333.

[6] § 205. McGregor *v.* Battle, 128 Ga. 577, 58 S. E. 28 (1907); Shopert *v.* Indiana National Bank, 41 Ind. App. 474, 83 N. E. 515 (1908); Butcher *v.* Butler, 134 Mo. App. 61, 114 S. W. 564 (1908).

law require the bank to return to the government officials an annual account of moneys deposited, yet the bank is not bound to return any account of its special deposits.[1]

Trover will lie for a depositor to recover his special deposit, *in specie;* or, if it has been converted by the bailee, *assumpsit* will lie to recover its value.[2]

A bank has no right to use a special deposit or to mingle it with its funds.[2a]

Interest can be allowed on a special deposit only from the time of wrongful refusal to return it.[3]

[1] Foster *v.* Essex Bank, 17 Mass. 479.

[2] *Ibid.;* Bank of Columbia *v.* Patterson's Adm'r, 7 Cranch 299; Green *v.* Sizer, 40 Miss. 530.

[2a] Covey *v.* Cannon, 104 Ark. 550, 149 S. W. 514 (1912).

[3] Anderson *v.* Pacific Bank, 112 Cal. 598, 44 Pac. 1063.

CHAPTER XV

SPECIFIC DEPOSIT

DUTY OF THE BANK.

§ 207. A specific deposit must not be applied to any other purpose than the one for which it was deposited, and the instruction accompanying it must be carefully carried out.

§ 208. The bank has no lien on such deposits for its general balance; and if there is a surplus from sale of collateral, after payment of the debt secured, the bank cannot credit it on general account. § 325.

LIABILITY OF THE BANK.

(*a*) Property kept distinct.

§ 189 If the bank is a gratuitous bailee, it is liable, as for a special deposit, in case of negligence.

§ 211. If the bank is a bailee for hire, it is bound to ordinary care, and no more, and is liable for loss by theft, if grossly negligent.

§ 209. Receiving a commission does not necessarily make the bank a bailee for hire.

§ 215. (*b*) If the fund is not kept separate, but mingled with the property of the bank indistinguishably, the bank is liable as for a general deposit.

§ 630. The deposit becomes a debt, or a claim for damages grows upon the grave of the trust.

§ 589 *b*. TITLE TO. § 565 (2), (9).

§ 207. **A Specific Deposit must not be diverted from its Purpose.**[0] — A. deposited in a bank the counterparts of certain contracts to deliver oil at his own option within a stated time, and, as a security for the contracts, also deposited checks of H., who was a depositor in the bank, payable to the cashier "for margin for oil sold as per contracts in the hands of" the cashier. The counter-

[0] § 207. United States *v.* National Bank, 73 Fed. 379.

The bank is justified in refusing to pay checks when not drawn for the purpose of the specific deposit. Stephens *v.* Chehalis National Bank, 80 Wash. 254, 141 Pac. 340 (1914); and it is liable for failure to pay checks drawn for the specific purpose of the deposit. Eshbach *v.* Byers, 164 Ill. App. 449 (1911).

parts were indorsed by A., to the effect that the margin was a guaranty for the fulfilment of the contracts, and with the further stipulation, that, if more margin be needed, demand should be made on A., and if not met the contract should be sold. The cashier also indorsed on the counterparts the receipts for the margins on the conditions therein set forth. Before the contracts matured they were settled, and the margins were carried by the bank to the credit of A., who drew them out by check. In an action by H. against the bank for the margins, he recovered, the court holding that the checks operated as a specific appropriation, to the extent named therein, of the drawer's funds, to be applied by the bank solely to pay such sum as A. might become liable to pay on the event of his failure to comply with the contracts, and the bank, as custodian of the money for that specific purpose, had no right to appropriate it in any other way.[1]

So, where a buyer of cattle, indebted to a banking firm as principal upon a note that had matured, deposited and checked out an amount greater than the note, under a special agreement with the bank that he would give the sellers checks payable after he had sold the cattle and deposited the proceeds, and that the bank should apply such deposits exclusively to pay such checks. *Held*, that the same could not have been applied to pay the note.[2]

§ 208. **Instructions accompanying a Deposit,** and coming from the proper authority, must be carefully attended to. When the depositor orders his money to be put on one of his accounts, or to be applied to take up a particular check or note, or to be transmitted to a certain person, or whatever special direction he may give, the bank must obey if it receives the deposit at all.[1]

[1] Parker *v.* Hartley, 91 Pa. St. 465 (1879).

[2] Wilson *v.* Dawson, 52 Ind. 513 (1876).

[1] § 208. Judy *v.* Farmers & Traders' Bank, 81 Mo. 404; Union National Bank *v.* Desmond, 33 Ill. App. 102; Desmond *v.* Merchants' National Bank, 33 Ill. App. 95; Hummel *v.* First National Bank, 2 Col. App. 571; McDonald *v.* American National Bank, 25 Mont. 456, 65 Pac. 896 (1901); Marsh *v.* First State Bank, 185 Ill. App. 29 (1913), and the words "% D. W. T." are immaterial since they do not amount to a direction to deposit to the general account of D. W. T.

When a bank receives money to loan on good real estate security it is guilty of fraud in loaning the money to an insolvent person without taking good security therefor, or in transferring to the depositor secured notes held by it but which it is not willing to recommend without qualification. Larsen *v.* Utah Loan etc. Co., 23 Utah 449, 65 Pac. 208 (1901).

If a banker is authorized to loan his customer's money he is the customer's agent for that purpose and is only liable for failure to exercise

If the purpose for which the special deposit was made, fails, the bank is liable to the depositor for the return of the funds.[1a]

When the bank returns to the depositor money deposited as a forfeit it is liable if the depositor is the one who fails to fulfil the condition.[1b] But if a bank holds money deposited on a continuing offer lacking mutuality it is not liable to the other party on a revocation of the offer.[1c]

If money is left by C. to be sent to bank A., and instead it is sent (according to a custom among the banks) to B., the correspondent of A., *without notice to B.* that the fund belongs to C., and, A. becoming insolvent, B. applies the money on A.'s debt to itself, the depository bank is liable to C. for the amount, for it should have transmitted directly to A., or have accompanied the funds with notice of C.'s rights, so that B. could not have acquired title to them.[2]

§ 209. **A Commission does not always make the Bank a Bailee for Hire.** — A bank was in the habit of taking bonds for safe keeping, and of detaching the coupons and collecting the interest for the depositors of the bonds. It sent these coupons to city banks and the proceeds were there placed to its credit, and upon the funds thus accumulated it would draw drafts and charge a small commission therefor. The interest paid by the city banks was inconsiderable, and the amount realized therefrom, and the commissions on drafts, did not compensate for the trouble of forwarding the coupons and paying out the interest. *Held*, that these facts did not constitute the bank a bailee for hire.[1]

§ 210. **Liability for Money deposited specifically.** — It is the custom of banks, upon receiving money for a specific purpose, as

good faith and reasonable diligence. But if he loans the money without authority he becomes agent from his own wrong and becomes absolutely responsible for the money. Watson *v.* Fagner, 99 Ill. App. 364 (1901); *id.*, 105 Ill. App. 52 (1902).

The instructions may be shown after the decease of the depositor. Washbon *v.* State Bank, 86 Kan. 468, 122 Pac. 515 (1912); Fidelity etc. Co. *v.* State Bank, 91 Kan. 740, 139 Pac. 370 (1914).

[1a] American Exchange National Bank *v.* Loretta Gold and Silver Mining Co., 165 Ill. 103, 46 N. E. 202; McDonald *v.* American National Bank, 25 Mont. 456, 65 Pac. 896 (1901); Mester *v.* Quincy National Bank, 163 Ill. App. 645 (1911).

[1b] Hunter *v.* Wallace, 57 Tex. Civ. App. 1, 121 S. W. 180 (1909).

[1c] Herrin *v.* Scandinavian-American Bank, 65 Wash. 569, 118 Pac. 648 (1911).

[2] Drovers' National Bank *v.* O'Hare, 119 Ill. 646, 10 N. E. 360.

[1] § 209. Comp *v.* Carlisle Deposit Bank, 94 Pa. St. 409 (1880).

to pay a note, to mingle the funds with their own, and to pay the note at the proper time, just as they would a check; the funds are not kept separate. There is no practical difference between such a deposit and a general deposit, and it seems clear that the bank should be held to the same liability as for a general deposit.[1]

Evidence of Liability

A certificate issued by a cashier of a bank in the ordinary course of business, stating the receipt of a specific deposit, payable on the happening of a certain contingency, is *prima facie* evidence of the bank's liability.[2]

§ 211. **Liability of Bank for Collateral Security.** — In the case of property pledged to the bank as collateral security, it has been said that the bank is bound only to ordinary care in keeping it.[1]

§ 212. **Gross Negligence makes the Bank liable.** — A bank is liable for securities deposited as collateral and stolen by the president, if the bank has been remiss in its duty in the selection and supervision of its officers.[1] In this case the trustees were in the habit of leaving the entire active management of the bank in the hands of the president; he had occasionally abstracted securities and used them in his own private affairs, but had been accustomed to return them whenever called for. It appeared that the borrower knew of these facts when he deposited the security. The trustees did not hold the meetings required by the by-laws. The court held that the bank was bound to use ordinary care to select good officers and servants, and that it must exercise such supervision and vigilance as a discreet person would use in his own affairs. A bank might not be liable for a single act of fraud or crime, where it would be for a continuous series of acts, especially so easily detected as here. Here are no meetings, no supervision, no examination, no inquiry, actual knowledge of the managing trustee of the wrongful conduct, and silence.[1] Surely a strong case.

Bonds were deposited as a special deposit; afterward they

[1] § 210. McLain *v.* Wallace, 103 Ind. 563, 5 N. E. 911.

[2] American National Bank *v.* Presnall, 58 Kan. 69, 48 Pac. 556 (1897).

[1] § 211. Jenkins *v.* National Village Bank, 58 Me. 275; Dearborn *v.* Union National Bank, 58 *id.*, 273; 61 *id.*, 369. See Orme *v.* Baker, 74 Ohio St. 337, 78 N. E. 439 (1906); Scott *v.* First National Bank, 5 Ind. T. 292, 82 S. W. 751 (1904).

[1] § 212. Cutting *v.* Marlor, 78 N. Y. 454.

were held as collateral security. They were embezzled by the cashier. *Held*, the bank was liable as a pledgee, it having been guilty of gross negligence in allowing the cashier to retain his position after knowledge that he gambled.[2]

Where bonds are delivered to a bank as collateral security for a debt, if it does not appear what has become of them, it is to be assumed that they are in the bank's possession.[3]

[2] Prather *v.* Kean, 29 Fed. 498 (Feb. 1887).
[3] Detroit Motor Co. *v.* Third National Bank, 111 Mich. 407, 69 N. W. 726 (1897).

CHAPTER XVI

COLLECTION IN GENERAL

(See "Title" and "Deposit.")

A. Nature of the Contract.

§ 214. In collecting upon paper in its hands, or in applying money previously received, the bank acts as agent for the one who is entitled to the proceeds; but if money was received before the paper was lodged with it for collection, or before maturity of the paper, and not applied, it has acted only as agent of the debtor.

§ 215. The consideration arising from the hope of attracting custom is sufficient, though a commission may be charged.

§ 216. The authority to collect continues after dishonor, if the paper is left with the bank.

§ 217. Indorsement to "Bank, for collection," neither carries title to the bank, nor makes the indorser liable as such, but is notice to all of the indorser's right to the proceeds, and also that B. or his agent is the proper person to receive payment.

B. Duty of the Bank.

I. In General.

§§ 218, 219. (1) The bank must use reasonable care and skill, keeping in mind the best interests of its principal, and so acting as to preserve the liability of all parties to him, by proper presentment, protest, notice, and care of securities, so far as reasonable diligence can accomplish these objects. See § 239.

§ 230. (2) The bank must observe the laws and usages prevail-
§ 243. ing in its locus, unless the contract is in reference to some other, as,

§ 221. When it receives special instructions, or when the parties must be presumed to have contracted in reference to the *usage* of a particular bank.

§ 222. Proof of knowledge of usage of a single bank.

§ 223. (3) Local usage can affect only the *manner* of presentment, notice, etc., and cannot justify their omission. See *contra*, § 231.

§ 224. (4) The bank must obey *instructions* received from its principal, and must forward proper directions to its correspondent. § 362.

§ 255. (5) Must take care of collateral security, bills of lading, etc.

§ 226. (6) The bank has *discretion* in doubtful cases. See §§ 255, 256.

II. Special Statement of Duties of Bank collecting in Locus.

(1) Presentment for acceptance. See § 252 *a*.

§ 258. (*a*) What paper must be presented for acceptance.

§ 227. (1) Draft payable at a future day should be presented.

§ 258. (*b*) When presentment for acceptance should be made, where, by whom, to whom, its effect, and the effect of failure.

§§ 229, 259. (2) Presentment for payment.

§§ 240, 242, 245. (*a*) Time of.

§§ 230, 259 *b*. (*b*) Place of.

§§ 223, 231. (*c*) Usage of some banks to send notice to the debtor that the paper is at the bank, instead of making demand upon him in the regular way.

§ 259. (*d*) By whom, on whom, and how, presentment for payment should be made.

§ 228. (3) Protest, or steps taken to provide authentic evidence of dishonor. See § 252 *c*.

§ 260. What paper should be, and what may be, protested, where, when, by whom, and how the protest is to be made.

§ 261. (4) Notice of dishonor.

General statement.

§ 232. The bank need give notice only to its immediate principal, unless agreement or usage vary the rule.

(*a*) As in New York city.

§ 233. (*b*) When notice is to be given.

Manner of notice, when personal, and when by mail.

(*c*) Test of the difference of place requisite to use of the mail.

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§ 237. IV. Collection of Checks.

§ 238. (1) Distinction between duty of bank to its customer and duties existing between other parties.

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(2) Time of presenting checks. See § 259.

§ 240. General rule.
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§ 241. Time within which a check payable in another place must be forwarded.
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§ 222. of dealing, general usage of the banks in a city or town, or usage of a particular bank, in certain cases.
§ 244. The fundamental rule.
Underlying all questions of presentment, notice, etc., is that the bank must use ordinary care and diligence under all the circumstances.

§ 245. V. Crossed Checks.
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§ 246. VI. Suits by the Bank upon Paper it holds for Collection.

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§ 247. (1) The general rule is that only good money is to be received in payment of paper by collecting bank.
(*a*) Mode of dealing, or an agreement, may vary the rule, and a bank may take its own certificate of deposit, unless the taking is a fraud. § 305.
(*b*) A substituted note may be recovered by the owner of the note for which the substitute was received.
(*c*) Check taken in payment without authority is at the bank's risk, (unless the principal ratifies its action, as he may do, by receiving the check, with knowledge of the facts of the case,) and it should take care to preserve the evidence of liability of prior parties. See § 366.
§ 247. (*d*) If the bank receives depreciated currency, it must make good the face of the paper in good money.

(2) Disposal of the Proceeds.
§ 248. The bank may elect to credit them to the principal on general deposit (unless the instructions are to collect and remit),
(1) When the owner is a depositor.
(2) When he is not.
Or it may retain them as a special deposit, or, without instructions, remit them at once.
If it credits them, it will bear any loss that occurs by depreciation of the funds received. If it keeps separate the specific funds, it may at any time discharge itself by delivering them to the owner of the paper, from the collection of which they are the proceeds.

§ 248 (*a*). Insolvency revokes the right to credit the proceeds, and mingle them with the bank's funds.
Insolvency of the collecting bank.
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C. Liabilities growing out of Collection.
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§ 254. When Depositor is also in Fault.

§ 214. **The Collecting Bank acts as Agent.** — A bank receiving paper for collection[0] is generally the agent of the party from whom it receives it;[1] sometimes of the real owner, if he stands

[0] § 214. The delivery of a certificate of deposit by mail with a letter stating that it was "for deposit in your bank to my credit" is a deposit for collection. Hilsinger *v.* Trickett, 86 Ohio St. 286, 99 N. E. 305, 1913D Ann. Cas. 421, n.

[1] Daly *v.* Butchers & Drovers' Bank of St. Louis, 56 Mo. 94, and cases cited *post;* Ward *v.* Smith, 7 Wall. 447, 19 L. ed. 207; Exchange Bank *v.* Sutton Bank, 78 Md. 577; Medland National Bank *v.* Brightwell, 148 Mo. 358, 49 S. W. 994 (1898); Garrison *v.* Union Trust Co., 139 Mich. 392, 102 N. W. 978, 111 Am. St. Rep. 407, 70 L. R. A. 615 (1905); Commercial National Bank *v.* First National Bank, 158 Ky. 392, 165 S. W. 398 (1914); Fort Dearborn National Bank *v.* Security Bank, 87 Minn. 81, 91 N. W. 257 (1902); Ober *v.* Cochran, 118 Ga. 396, 45 S. E. 382, 98 Am. St. Rep. 118 (1903); Second National Bank *v.* Bank of Alma, 99 Ark. 386, 138 S. W. 472 (1911); Fanset *v.* Garden City State Bank, 24 S. D. 248, 123 N. W. 686 (1909); Lord *v.* Hingham National Bank, 186 Mass. 161, 71 N. E. 312 (1904); Gleason *v.* Thayer, 87 Conn. 248, 87 Atl. 790, 1915B Ann. Cas. 1069, n.; Goshorn *v.* Murray, 197 Fed. 407 (1912); Security Savings etc. Co. *v.* King, 69 Or. 228, 138 Pac. 465 (1914); Na-

farther removed in the chain of title.[2] But in no sense is it the agent or trustee for the maker of the paper it holds for collection, or for the party who is indebted thereon. If the debtor simply pays into the bank the amount due, and takes up his paper, he is thereby fully acquitted and absolved. He is not responsible for the subsequent fate of the sum, and is not bound to inquire whether it comes to the hands of the person entitled to it, or is lost, wasted, or embezzled in the bank. As he is under no liability of this description, so it follows that he has no right of action against the bank if it fails to pay over properly. The whole business is completed, so far as he is concerned, by his payment and the contemporaneous surrender, cancellation, or destruction of the evidence of his debt.[3]

Paper Payable at the Bank

If a note, bond, or other instrument, be made payable at a bank, and be deposited in that bank for collection, the bank becomes the agent of the payee to receive the money. But if it be not deposited in the bank, and the debtor deposits money there to meet it, then the bank is the agent of the debtor.[4] By making such deposit in due season, the debtor so far fulfills his duty that, if the obligation be not presented there for payment at the day of its maturity, the debtor is liable for no loss or damage which may subsequently accrue, either in the way of interest or costs of suit, by reason of the delay.[4] Apparently, too, he should be acquitted if subsequently, and before demand by the holder of the paper, the bank should fail.

tional Revere Bank *v.* National Bank of Republic, 172 N. Y. 102, 64 N. E. 799 (1902).

A check may be received for collection from the holder even though it is made payable to a guardian and duly indorsed by him as such. Hood *v.* Kensington National Bank, 230 Pa. St. 508, 79 Atl. 714 (1911).

When paper is sent to a bank for collection at the request of the obligor, the bank is the agent of the owner of the paper in making the collection. Schafer *v.* Olson, 24 N. D. 542, 139 N. W. 983, 43 L. R. A. (N. S.) 762 (1913).

The agency may be revoked by the true owner of the paper at any time prior to the collection of the money; and if the paper is not returned upon demand there is a conversion thereof for which an action may be maintained. Bank of America *v.* Waydell, 103 App. Div. 25 (1905), 92 N. Y. S. 666, 187 N. Y. 115, 79 N. E. 857.

[2] The question who, as principal, may hold the bank as agent, is discussed hereafter.

[3] Smith *v.* Essex County Bank, 22 Barb. (N. Y.) 627.

[4] Ward *v.* Smith, 7 Wall. 447, 19 L. ed. 207.

Where a seller consigns goods to his own order, and attaches to the bill of lading a draft upon the purchaser for the price, and places such draft in the bank with directions to collect, and turn over the bill of lading to the purchaser, the bank is the agent of the seller.[4a]

Agent of Debtor When Receiving Money to Pay Note not in Its Possession

A note was sent to the M. Bank indorsed for collection for the Y. Bank. The M. Bank had received money from the maker to pay the note, but failed before remitting the proceeds, and the note was found uncancelled among its papers. *Held*, that the note had not been paid; the M. Bank had done nothing as the agents of the holders of the note toward paying it.[5]

This case brings clearly to view the distinction that if the bank, having received a note for collection, afterward collects the money for it, or, having the money already deposited for that purpose, applies it to the note, these acts are done as agent for the holder of the note; but if the maker deposits money to pay a note before it is received by the bank, or before it is due, such receiving of money is as agent of the maker only, and unless the bank subsequently does some act applying the money upon the note, it does not act as agent for the note holder, and the latter is not prevented from recovering the paper and suing the maker upon it.

So if A. deposits money to pay a claim, and before applying the money to this purpose the bank fails, it is the loss of A., not of his creditor.[6]

§ 215. **Consideration for Collecting.**[0]—Sometimes banks charge a commission for collection where the business is required to be done in distant places. Sometimes they do it without charge, trusting to the indirect profits and advantages which may be expected to accrue by reason of the chance of the money being left uncalled for during a few days following its actual receipt, and their consequent use of it for that time; or from the hope of attracting customers and increasing their business by offering such facilities without extra charges. These motives of self-

[4a] Charles *v.* Carter, 96 Tenn. 617, 36 S. W. 396 (1896).

[5] Sutherland *v.* First National Bank of Ypsilanti, 31 Mich. 230.

[6] Moore *v.* Meyer, 57 Ala. 20; State Bank *v.* Byrne, 97 Mich. 178, 56 N. W. 355.

[0] § 215. See Fed. Res. Act, Sec. 16, Part II, § 167.

interest, which must always be supposed to influence the bank when it consents to collect without direct compensation, are to be regarded as constituting a sufficient and valuable inducement for the undertaking to collect; and prevent the bank from availing itself of the plea that its contract was without consideration.[1]

§ 216. **Continuance of Authority to Collect.** — Authority to collect continues after the paper is due and protested, and notes are often left with a bank some time after protest in the hope that they may be taken up, as they often are to save the credit of the debtor. But it is questionable whether a payment may be received two or three years after dishonor, in a currency depreciated to one twelfth of the value of that in which the note should have been paid at its maturity.[1] Insolvency revokes authority to collect.[2]

§ 217. **Effect of Indorsement for Collection.** — Indorsement for collection does not give the bank title to the paper,[1] nor render the depositor liable as an indorser,[2] nor guarantee the drawer's

[1] § 215. Halls *v.* Bank of the State, 3 Rich. (S. C.) 366. Also see remarks per Lord Loughborough in Shiells *v.* Blackburne, 1 H. Bl. 159; the analogy is sufficiently strong to make this case an authority for the doctrine of the text. But in Bank *v.* Butler, 41 Ohio St. 519, the court in holding the bank excused on other grounds fortifies itself by saying that the bank received no remuneration.

[1] § 216. Alley *v.* Rogers, 19 Gratt. (Va.) 366.

[2] Western German Bank *v.* Norvell, 134 Fed. 724 (1905).

[1] § 217. See § 565, Title. So if a note is sent for collection and the bank allows it to remain uncancelled among its papers, and fails, the note is unpaid, and may be recovered, although the bank had received money from the maker expressly to pay it. The payment not having been actually made, and the title to the note being in the depositor of it, he may reclaim it. Sutherland *v.* First National Bank, 31 Mich. 230. So collaterals sent with a draft which is still uncollected may be recovered; they are not assets of the bank in case of insolvency. Corn Exchange Bank *v.* Blye, 44 N. Y. (Sup. Ct.) 473, aff. 101 N. Y. (Ct. of Appeals) 303; U. S. National Bank *v.* Geer, 55 Neb. 469 (1898); Branch *v.* U. S. National Bank, 50 Neb. 470, 70 N. W. 34 (1897).

Nor does the correspondent to which it is sent for collection receive any better title than the one who sent it, unless it becomes a *bona fide* purchaser or makes advances thereon in good faith. Bank of America *v.* Waydell, 187 N. Y. 115, 79 N. E. 857 (1907).

The forwarding bank of such indorsed check is in the position of one who takes a check and presents it in person to the drawee bank and demands payment. Newberry Savings Bank *v.* Bank of Columbia, 91 S. C. 294, 74 S. E. 615, 38 L. R. A. (N. S.) 1200 (1912).

[2] Broun *v.* Hull, 33 Gratt. (Va.) 23. And parol is not admissible to show that an indorsement "for collection" was really an absolute one. Third National Bank *v.* Clark, 23 Minn. 263; U. S. National Bank *v.* Geer, 55 Neb. 469 (1898).

signature.[2a] But the bank is deemed the holder to receive and transmit notice of non-payment.[3]

Notice of Ownership

Indorsement to "B. for collection" is notice to the maker of the note that B. or his agent is the proper party to collect the note, and if he pays it to any one else it is at his own risk.[4]

A bank receiving a note from the owner indorsed simply for collection, with instructions to apply the proceeds to his indebtedness to the bank, does not receive it as collateral security, but as his agent.[5]

Indorsement for collection is notice to all parties of the ownership of the proceeds, and the collecting bank cannot keep the proceeds to pay the debt of the bank that forwarded the paper to it.[6]

Indorsement for Collection Destroys Negotiability

A. at St. Louis, owing V. at St. Joseph's $40,000, requested V. to draw on him, and he would raise the money on the draft, and

[2a] Bank of Belmont *v.* Bank of Barnesville, 55 Ohio St. 207 (1898).

[3] Freeman's Bank *v.* Perkins, 18 Me. 292; Ogden *v.* Dobbin, 2 Hall (N. Y.) 112.

[4] Barnett *v.* Ringgold, 80 Ky. 289; Freeman's Bank *v.* National Tube Works, 151 Mass. 413, 24 N. E. 779 (1890); citing Lynn National Bank *v.* Smith, 132 Mass. 227; Rice *v.* Stearns, 3 Mass. 225; Wilson *v.* Holmes, 5 Mass. 543; Dorchester & Milton Bank *v.* New England Bank, 1 Cush. 177; Boykin *v.* Bank, 118 N. C. 566, 24 S. E. 357 (1896); First National Bank of Circleville *v.* Bank of Monroe, 33 Fed. 408. See also Peck *v.* First National Bank, 43 Fed. 357; Bank of Clarke Co. *v.* Gilman, 81 Hun (N. Y.) 486; Manufacturers' Bank *v.* Continental Bank, 148 Mass. 553, 20 N. E. 193 (1889), citing Audenried *v.* Betteley, 8 Allen (Mass.) 302; Bank of Belmont *v.* Bank of Barnesville, 55 Ohio St. 207 (1898); Tyson and Rawls *v.* Western National Bank, 77 Md. 412, 26 Atl. 520; Evansville Bank *v.* German American Bank, 155 U. S. 556, 39 L. ed. 259, 15 Sup. Ct. 221.

[5] Prescott *v.* Leonard, 32 Kan. 142, 4 Pac. 172; Cronheim *v.* Postal Telegraph Co., 10 Ga. App. 716, 74 S. E. 78 (1912).

A bank which receives a check for collection and enters the face value of it as a deposit credit to the owner becomes the agent of the owner to collect it. Jefferson County Sav. Bank *v.* Hendrick, 147 Ala. 670, 39 So. 295, 1 L. R. A. (N. S.) 246, n.

[6] City Bank *v.* Weiss, 3 S. W. 299 (Tex., April, 1887); People's Bank *v.* Jefferson Co. Savings Bank, 106 Ala. 525, 17 So. 728 (1896).

This is true even though the draft was made payable to the cashier of the forwarding bank but was accompanied by a letter stating that the draft was for "collection and credit" which letter was forwarded with the draft to the collecting bank. Morris *v.* Alabama-Carbon Co., 139 Ala. 620, 36 So. 764 (1903).

remit the proceeds to V.; whereupon V. drew to the order of the bank at St. Joseph's, whose cashier indorsed on the draft, "Pay to H. or order for collection for account of First National Bank." A. on receiving the draft accepted it, and offered it for discount to the Mechanics' Bank. By A.'s consent and that of the Mechanics' Bank the indorsement was erased, the Mechanics' Bank discounted the draft, and A. remitted the amount to V. In an action by the Mechanics' Bank against V.,[7] it was held that the indorsement, being restrictive, destroyed the negotiability of the draft, and operated as a mere power of attorney to the plaintiff to receive the proceeds for the use of the drawer; and that the erasure without V.'s assent destroyed the validity of the draft as to him, and the plaintiff was bound to know that such was its effect when the draft was taken.

§ 218. **General Statement of the Duties of the Collecting Bank.** — A bank contracts to use due diligence in the business of collection.[1] And it is "bound only to reasonable care and diligence in the discharge of its assumed duties. In a case of doubt its best judgment is all the principal has a right to require." Especially if the doubt arises by reason of the neglect of the principal to give specific instructions, the bank will be acquitted, even if its discretion be exercised erroneously.[2]

Placard Hung in the Bank

The contract may be varied by express agreement, and it has been held that the plaintiff, in a suit alleging negligence on the part of the bank in failing to make a collection, may adduce evidence of the contents of a placard posted up in the bank, whereby the bank offered to make collections upon certain terms (the president having been notified to produce the placard, and not having done so); that this constituted an important link in the

[7] Mechanics' Bank *v.* Valley Packing Co., 4 Mo. App. 200 (1877).

[1] § 218. Fabens *v.* Mercantile Bank, 23 Pick. (Mass.) 330; Bank of Big Cabin *v.* English, 41 Okla. 546, 139 Pac. 258 (1914); Hilsinger *v.* Trickett, 86 Ohio St. 286, 99 N. E. 305, 1913D Ann. Cas. 421, n.; Pinkney *v.* Kanawha Valley Bank, 68 W. Va. 254, 69 S. E. 1012, 1912B Ann. Cas. 115, n., 32 L. R. A. (n. s.) 987; Manhattan Life Ins. Co. *v.* First National Bank, 20 Colo. App. 529, 80 Pac. 467 (1905).

[2] National Bank of Commerce *v.* Merchants' National Bank, 91 U. S. 92, 23 L. ed. 208; Sahlien *v.* Bank, 90 Tenn. 221, 16 S. W. 373 (1890). See Bank of Bay Biscayne *v.* Monongahela National Bank, 126 Fed. 436 (1903).

chain of evidence going to show what the contract between the parties in fact was; and that this evidence was admissible without preliminary proof that the plaintiff had read the placard, or had acted upon the faith of it.[3]

§ 219. **The Bank's Duty** is to act for its principal's best interest, and preserve the liability of all parties to him. "It is the duty of an agent who receives negotiable paper for collection, in case such paper is not paid, so to act as to secure and preserve the liability thereon of all the parties prior to his principal; and if he fails in his duty, and thereby causes loss to his principal, he becomes liable for such loss.[0] But this is not the utmost limit of the agent's duty and liability. He may so act as to charge all the parties to the paper, and yet become liable for a loss occasioned by his negligence. The rule which will measure the diligence which is exacted of a holder of such paper in order to charge the prior parties, will not always measure the diligence which is required of a collecting agent in the discharge of his duty to his principal. Suppose an agent receives for collection from the payee a sight draft. No circumstance can make it his duty in order to charge the drawer to present it for payment until the next day. He has entered into no contract with the drawer, is not employed or paid by him to render him any service, and owes him no duty to protect him from loss. What is required to be done to charge the drawer is simply a compliance with the condition attached to the draft, as if written therein; and that condition is in all cases complied with by presentation, demand, and notice on the next day after receipt of the draft. But suppose the agent on the day he receives the draft obtains reliable information that the drawee must fail the next day, and that the draft will not be paid unless immediately presented, what then is the duty he owes his principal, whose interests for a compensation he has agreed with proper diligence and skill to serve in and about the collection of the draft? Clearly, all would say, to present the draft at once,

[3] Wingate *v.* Mechanics' Bank, 10 Barr (Pa.), 104.

[0] § 219. Jagger *v.* National German-American Bank, 53 Minn. 386; Bank *v.* Bank, 49 Ohio St. 351, 30 N. E. 958 (1892); West *v.* St. Paul National Bank, 54 Minn. 466, 56 N. W. 54; Carpenter *v.* National Shawmut Bank, 187 Fed. 1 (1911); Bank of Big Cabin *v.* English, 41 Okla. 546, 139 Pac. 258 (1914); Fort Dearborn National Bank *v.* Security Bank, 87 Minn. 81, 91 N. W. 257 (1902); Louisville Banking Co. *v.* Asher, 112 Ky. 138, 65 S. W. 133, 99 Am. St. Rep. 283 (1901); McBride *v.* Illinois National Bank, 138 App. Div. 339 (1910), 121 N. Y. S. 1041.

and if he fails to do this and loss ensues he incurs responsibility to his principal; and yet the drawer would be charged if it was not presented until the next day. When an agent receives a bill for collection payable some days or months after date, in order to charge the drawer, he need not present it for acceptance until it falls due; and if he then presents it and demands payment, and protests it, and gives the notice, the drawer is held; and yet in such a case he owes his principal the duty to present the bill for acceptance at once, and if he fails in such duty, and loss ensues to his principal, he becomes liable for such loss." [1]

When a bank receives a note for collection payable to any bank in the city in which the bank is located its only duty is to present the note for payment at the proper time at the counter of some bank in the city, including itself, and to notify its correspondent bank of any default. And even though the bank to which it is sent has on deposit money of the maker of the note it is not justified in paying the note from the deposit.[1a]

Adverse Interest

A bank having a claim against an insolvent firm, upon being consulted by other creditors of said firm in regard to collecting and securing their claim, is not legally bound to disclose to such creditors the existence of its own claim, but may keep silent and protect its own interests provided it is guilty of no fraudulent conduct, and does nothing more than is necessary to protect its own interests.[2]

And it may, *in good faith,* obtain security to protect its own claim although it neglects to obtain security for the payment of paper it holds for collection.[3]

By receiving a draft for collection a bank does not waive its

[1] First National Bank *v.* Fourth National Bank, 77 N. Y. 323; Pinkney *v.* Kanawha Valley Bank, 69 W. Va. 446, 69 S. E. 1012, 1912B Ann. Cas. 115, n., 32 L. R. A. (N. S.) 987; Howard *v.* Bank of Metropolis, 95 App. Div. 342 (1904), 88 N. Y. S. 1070.

[1a] Carpenter *v.* National Shawmut Bank, 187 Fed. 1 (1911).

The term "any bank" is different from "a bank " or "the bank" used in Mass. Rev. Laws, Ch. 73 § 104. Carpenter *v.* National Shawmut Bank, *supra.*

[2] National Bank *v.* Naill, 52 Kan. 211 (1893), 34 Pac. 797, citing Bliss *v.* Couch, 46 Kan. 400, 26 Pac. 706; Randall *v.* Shaw, 28 Kan. 419; Tootle *v.* Coldwell, 30 Kan. 125, 1 Pac. 329.

[3] U. S. Bank *v.* Westervelt, 55 Neb. 425, 75 N. W. 857 (1898), distinguishing Dern *v.* Kellogg, 54 Neb. 560, 74 N. W. 844.

right to collect its own claims against the drawee, and it may secure by attachment priority for itself although there is nothing left to pay the drafts received.[4]

It is for the jury to decide whether the bank has acted with negligence or fraud.[5] Negligence is not presumed; it must be proved.[6]

§ 220. **What Law and Usage shall govern the Collection.** — The collecting bank must be governed in all matters concerning the time and mode of presentment, demand, and notice by the laws and customs which prevail in the place of its own situation. If the paper has been transmitted from a distant place, where the laws and customs are different, the transmitting party, if he wishes these to be conformed to, must send special instructions to that effect. In that case the collecting bank, if it undertakes the collection, will be bound, at its own peril, not to deviate from the course thus prescribed; though in the absence of express directions it would not be bound to inquire into, nor probably would it even have the right to recognize, if it knew, the laws or usages of any place other than its own. The understanding, which is assumed to be mutual and to enter into the contract of the parties, is that the bank shall perform the various acts which are embraced in the business of collection in every respect according to the method which it is wont to pursue, in accordance with the local law, rules, and regulations.[1] Evidence of the habitual course of dealing, provided it be not incurably illegal, is admissible, not as amounting to rules of judicial decision, but as evidence of the contract.[2] The assent of all concerned to the

[4] Freeman *v.* Bank, 78 Iowa 150, 42 N. W. 632.

[5] Finch *v.* Karste, 97 Mich. 21, 56 N. W. 123; Sprague *v.* Farmers' National Bank, 63 Kan. 12, 64 Pac. 967 (1901); Bank of Big Cabin *v.* English, 41 Okla. 546, 139 Pac. 258 (1914).

[6] Storm Bros. *v.* First National Bank, 148 Ky. 585, 147 S. W. 5 (1912).

[1] § 220. Lincoln & Kennebec Bank *v.* Page, 9 Mass. 155; Chicopee Bank *v.* Eager, 9 Met. (Mass.) 584; Hartford Bank *v.* Stedman, 3 Conn. 489; Bowen *v.* Newell, 5 Sandf. (N. Y.) 326; Hilsinger *v.* Trickett, 86 Ohio St. 286, 99 N. E. 305, 1913D Ann. Cas. 421, n.; Holder *v.* Western German Bank, 132 Fed. 187 (1904); *id.* 136 Fed. 90 (1905); and all the cases cited below in the discussion of this topic.

[2] Warren Bank *v.* Suffolk Bank, 10 Cush. (Mass.) 582; Blanchard *v.* Hilliard, 11 Mass. 88; Jones *v.* Fales, 4 *id.* 245; Widgery *v.* Munroe, 6 *id.*, 449; Renner *v.* Bank of Columbia, 9 Wheat. 581, 6 L. ed. 166; Yeaton *v.* Bank of Alexandria, 5 Cranch 49, 3 L. ed. 33; Bank of Columbia *v.* Fitzhugh, 1 Har. & G. (Md.) 239; Hartford Bank *v.* Stedman, 3 Conn. 489.

pursuance of this course of dealing, and their waiver of any strictly legal claims which they might have in contravention or variation thereof, becomes then an implication of law. All the parties upon the note are equally bound by this implication, though they have had nothing whatsoever to do with the paper at the time of its being deposited for collection, and so were not by immediate personal action parties to this portion of the proceedings, or able to influence or control them.[3] They are bound and concluded by the act, and the legal implications arising from the act, of him who has become the holder, and who has the right to put the note in the ordinary business channel for collection. Thus, if demand is made upon a note upon the day before or the day after it falls due, according to the established custom of the collecting bank, or upon the fourth day after maturity, under a local custom to allow four days of grace instead of three, the maker and the indorsers will be held, and cannot set up insufficiency or irregularity in the demand.[4] So a custom of a bank to hold the indorser without having first sued the maker, though he is solvent, is good.[5] So likewise a custom to make demand on the maker of a note lodged in a bank without presenting it to him.[6]

§ 221. **Usage of the Bank.** — Knowledge of the usage, either express or implied, must, it has been said, be brought home to the parties who are to be bound by it.[1] But other cases of high authority declare that the usage of the bank in collections will bind the persons dealing with it in this business, whether such usage be known to them or not;[2] and this is certainly

[3] Pearson (Brent's Ex'rs) *v.* Bank of Metropolis, 1 Pet. 89, 6 L. ed. 65.

[4] Patriotic Bank *v.* Farmers' Bank, 2 Cranch, C. C. 560; Bank of Columbia *v.* Magruder, 6 Har. & J. (Md.) 172; City Bank *v.* Cutter, 3 Pick. (Mass.) 414; Yeaton *v.* Bank of Alexandria, 5 Cranch 49, 3 L. ed. 33.

[5] Renner *v.* Bank of Columbia, 9 Wheat. 581, 6 L. ed. 166.

[6] Pearson (Brent's Ex'rs) *v.* Bank of the Metropolis, 1 Pet. 89, 6 L. ed. 65; Raborg *v.* Bank of Columbia, 1 Har. & G. (Md.) 231; Whitwell *v.* Johnson, 17 Mass. 452; City Bank *v.* Cutter, 3 Pick. (Mass.) 414.

[1] § 221. Mills *v.* Bank of United States, 11 Wheat. 431, 6 L. ed. 512; Peirce *v.* Butler, 14 Mass. 303; Bank of Commerce *v.* Miller, 105 Ill. App. 224 (1902).

[2] Smith *v.* Whiting, 12 Mass. 6; Bank of Washington *v.* Triplett, 1 Pet. 25, 7 L. ed. 37; Dorchester & Milton Bank *v.* New England Bank, 1 Cush. (Mass.) 177; Farmers' Bank and Trust Co. *v.* Newland, 97 Ky. 472, 31 S. W. 38 (1895); Jefferson County Savings Bank *v.* Commercial National Bank, 39 S. W. 338 (1897); Hilsinger *v.* Trickett, 86 Ohio St. 286, 99 N. E. 305, 1913D Ann. Cas. 421, n.; Plover Savings Bank *v.* Moodie, 135 Iowa 685, 110 N. W. 29 (1907); Holder *v.* Western German

the correct rule. Indeed, the opposing cases can be easily reconciled by the link which appears to be suggested in one of them. The fact that one deals with the bank without taking the trouble to inquire as to its system will raise the implication that he already knows and is satisfied with that system. It is clear that, if a person hands over a note to a bank for collection without any species of remark as to the course to be pursued, the bank is not bound to thrust upon him a statement of its intended course, and to retain him till the whole theory has been expounded to him, when his conduct unmistakably shows that either he already knows it or else he does not desire to know it. Either he knows and approves it, or he voluntarily trusts to the wisdom of the bank, at his own deliberately assumed risk of its sufficiency. In such a case the bank not only has a right to assume, but it is even positively bound to assume, that his desire is that the ordinary and established usage be pursued. An unordered deviation from that usage, though the usage were unknown to him, would lay the bank open to his suit for damages; and the court must, as has been already shown, rule for him as matter of law that the pursuance of this custom was an implied item of the contract. It is clear, then, that he could not plead ignorance of it in order to lay a foundation for a suit against the bank for acting according to it. The knowledge on his part would be implied conclusively.[3]

§ 222. **Proof.** — Whenever it may be necessary to prove knowledge by an individual of the usage of a bank, proof of one transaction having been previously conducted between them in accordance with that usage is sufficient.[1]

It has been seen that the time when demand must be made may be modified by proof of usage concerning the local rule of grace. In like manner proof of a particular usage concerning the place at which demand shall be made, in default of the designation of any place in the instrument itself, is admissible, and

Bank, 132 Fed. 187 (1904); *id.*, 136 Fed. 90 (1905); Falls City Woolen Mills *v.* Louisville National Bank, 145 Ky. 64, 140 S. W. 66 (1911); Landa *v.* Traders' Bank, 118 Mo. App. 356, 94 S. W. 770 (1906).

Custom will not govern when it is in conflict with an express contract. Landa *v.* Traders' Bank, *supra*.

[3] See § 9, on Usage, in which this subject is further discussed and important cases are cited, showing upon what grounds knowledge of the usage and custom of the banks will be conclusively inferred at law.

[1] § 222. Dorchester & Milton Bank *v.* New England Bank, 1 Cush. (Mass.) 177.

may be conclusive. Thus, where a customer lived at a distance from his bank, and was wont to draw his notes "negotiable at" the bank, it was held that it was a proper case for the introduction of evidence of a custom to make presentment and demand upon his notes only at the bank; which custom, if sufficiently proved, would justify the collecting bank in presenting and demanding in compliance with it.[2]

§ 223. **Usage can only affect Manner of Collecting.** — But the usages which can be shown are solely those which qualify some portion of those proceedings which the bank is obliged to undertake for the immediate purpose of effecting the collection. It is only the points of detail, or the *methods* which the bank pursues in presenting, demanding, and notifying, that can be thus modified. No usage will justify the actual omission of any of these substantial and material acts, nor the substitution of any other act as an equivalent for any of them. The act must be distinctly done; it is only in reference to the manner of doing it, as regards time and place and the like considerations, that the rigidity of the general doctrines of the law may be slightly deflected by the force of local rules. Thus, though, as has been seen, demand may be made a day or two earlier or later than the usual third day after the literal maturity of the paper, yet demand must be made, and it must be a real *bona fide* demand. No usage can be allowed to substitute a notification to the makers of the time and of the place where the paper is deposited for collection, instead of the positive demand of payment which the law imperatively requires.[1] The contrary has, however, been held. See § 231 below.

It is a reasonable usage for local banks to accept in payment of drafts sent them for collection certified checks on one of their own number in good standing, to present these checks each day at 11 A.M., and to leave them for examination.[2]

But a mere usage between banks whereby the collecting bank credits the transmitting bank with the amount collected, instead of remitting, is not alone sufficient to be set up against the real owner of notes or bills so as to deprive him of his rights.[3]

[2] Pearson (Brent's Ex'rs) *v.* Bank of the Metropolis, 1 Pet, 89, 7 L. ed. 65.

[1] § 223. Farmers' Bank *v.* Duvall, 7 Gill & J. (Md.) 78.

[2] Jefferson County Savings Bank *v.* Commercial National Bank, 98 Tenn. 337, 39 S. W. 338 (1896).

[3] Armstrong *v.* National Bank, 90 Ky. 431, 14 S. W. 411 (1890).

§ 224. **Instructions.** — If the customer gives any instructions or directions concerning any item in the method which is to be pursued in collecting or protesting the paper, the bank receiving the paper is bound to forward such instructions and directions to its agent or correspondent. If it neglects altogether to transmit, or if it fails to transmit them accurately as the customer gave them, it will be liable for the resulting loss.[1] It may often happen that, where paper payable in one State is deposited in a bank situated in another State, it is necessary, in order to hold some of the parties upon it, that presentment, demand, and notice should all be performed according to the laws and usages of the State in which the first bank is situated, rather than of the State where the actual collection or protest is to be made. In such case it is certainly more proper for the depositor to notify the first bank of this fact. But it seems that even if he does not do so, yet the bank, if it is aware or ought to be aware of the existence of the necessity, is bound to transmit to its correspondent full and ample directions as to the precise form to be adhered to throughout the whole process.[2] In fact, it was upon this very point that the decision in the famous case of Allen *v.* Merchants' Bank really turned. The facts of that case were that the notary in protesting complied perfectly with the laws and customs of the place of his own residence. But these were different from the laws and customs of New York City, wherein the Merchants' Bank was situated. And though the court, choosing to call this *a default on the part of the notary*, which was not certainly his personal error, or his default at all in any usual sense of the word, gave a judgment in favor of the plaintiff, upon the ground that the bank was liable for the acts of all the sub-agents; yet it was not really necessary for them to have divided upon this question at all, provided they were all united, as they seem to have been, upon the other point which was ruled in the case. This other point was precisely the doctrine just asserted, and the declaration in the opinion was simply that, since the *lex loci contractus* governed, it was the duty of the bank to have notified its correspondents of the requirements of that law; and inasmuch as the loss had been caused by the failure of the notary to comply with those requirements which the bank had negligently failed to transmit, it was in fact caused by the non-performance

[1] § 224. Borup *v.* Nininger, 5 Minn. 523; Mechanics' Bank *v.* Earp, 4 Rawle (Pa.) 384.

[2] Allen *v.* Merchants' Bank, 22 Wend. (N. Y.) 215.

on the part of the bank of its obvious duty, and must therefore be made good by the bank. It is curious thus to observe how easily the whole controversy, which has made this cause famous, and a subject of criticism in so many tribunals, might have been completely avoided in it.

Instructions to a bank to "collect and credit a draft enclosed", which is indorsed to the writer, require the proceeds to be credited to the writer.[2a]

Liable for Disregarding Instructions

A bank must obey the instructions of its principal, and where it was told to allow a renewal of a note on condition that a good indorser should be obtained on the new note, and the bank took a renewal without such indorser, it was held liable to its principal on the subsequent insolvency of the maker.[3]

When a bank receiving a draft for collection surrenders a bill of lading accompanying such draft, contrary to instructions, it is liable for any damages which may have been sustained by reason thereof.[3o]

A bank having claims against D. to the extent of his entire property receives for collection a draft on D. with instructions to return immediately if not paid. These instructions are disobeyed, and subsequently directions to turn the draft over to attorneys for suit are neglected until the bank has secured a mortgage on D.'s property. The case should go to the jury on the questions of negligence and fraud.[3a]

Where the orders were, "On payment of the drafts, you will deliver the cargo to the order of A. If not paid, please hold and advise by telegraph", — and the receiving bank collected the sight drafts, and took *an acceptance of one of the drafts which was on*

[2a] Long *v.* Bank of Commerce, 38 S. W. 886 (1897).

[3] Central Georgia Bank *v.* Cleveland National Bank, 59 Ga. 667.

[3o] Second National Bank *v.* Bank of Alma, 99 Ark. 386, 138 S. W. 472 (1911).

The damage is *prima facie* the face of the draft, but the defendant may show the actual damage or that there was no damage. Becker *v.* First National Bank, 15 N. D. 279, 107 N. W. 986 (1906).

[3a] Finch *v.* Karste, 97 Mich. 21, 56 N. W. 123; Lord *v.* Hingham National Bank, 186 Mass. 161, 71 N. E. 312 (1904).

If a bank fails to return a note as directed it is liable for nominal damages even though it is improbable that it would have been collected if returned. Kiblinger *v.* Sauk Bank, 131 Wis. 595, 111 N. W. 709 (1907).

time, and delivered the cargo of wheat, the bills of lading of which accompanied the drafts, and before the maturity of the time draft the acceptor failed, the question of negligence went to the jury. The court thought there was a violation of the instructions amounting to negligence.[4]

Where a bank receives for collection a draft to which is pinned a package with the instructions, — "Papers to be delivered only on payment of draft", — the word "delivered" means absolute delivery, and permission of the bank to the drawee to take the package for the purpose of examination is not within the prohibition of the instructions.[4a]

Where the drawee is entitled to delivery of the bills of lading upon acceptance of the draft, of course the bank is guilty of no negligence in so doing.[5]

§ 225. **Duty of Collecting Bank concerning Collateral Security.** — It has been held that where a time draft, drawn by consignors of merchandise upon the consignees, is forwarded to a bank without any special instructions, but having the bills of lading for the merchandise attached, the bank is justified, by reason of the implied intention of the parties and the usages and necessities of business, in surrendering the bills of lading to the consignees upon their acceptance of the draft, without waiting for them to make final payment of it.[1]

But a bill of lading accompanying a time draft must be retained by a collecting bank after acceptance of the draft, to secure its payment when the bill of lading is made deliverable to con-

[4] National Bank *v.* City Bank, 103 U. S. 668, 26 L. ed. 417.

[4a] People's National Bank *v.* Freeman's National Bank, 169 Mass. 129, 47 N. E. 588. See Becker *v.* First National Bank, 15 N. D. 279, 107 N. W. 968 (1906), where the question of whether or not an automobile may be delivered for examination is undecided.

[5] Woolen *v.* N. Y. & Erie Bank, 12 Blatchf. 359.

[1] § 225. National Bank of Commerce *v.* Merchants' National Bank, 91 U. S. 92, 23 L. ed. 208; Lanfear *v.* Blossman, 1 La. Ann. 148; Wisconsin Marine & Fire Ins. Co. *v.* Bank of British North America, 21 Upper Canada, Q. B. 284; s. c. affirmed, 2 Upper Canada, E. & A. 282; Mason *v.* Hunt, 1 Dougl. (Eng.) 297; Commercial Bank *v.* Railway Co., 160 Ill. 401, 407, 43 N. E. 756, citing National Bank *v.* Merchants' Bank, 91 U. S. 92, 23 L. ed. 208; Porter on Bills of Lading, § 521; Bank *v.* Cummings, 89 Tenn. 613, 18 S. W. 115 (1890).

But if the bank surrenders the bill of lading and, without surrendering the draft, takes from the insolvent consignee a draft for the price, on third parties, the payment of which is refused, the bank is liable to the shipper of the merchandise for the loss occasioned thereby. People's National Bank *v.* Brogden, 98 Tex. 360, 83 S. W. 1098 (1904).

signor or his order.[1a] A bank receiving a sight draft for collection should not surrender the accompanying bill of lading until the draft has been paid.[1b]

Indorsement by a bank "for collection" on invoices that accompany bills of lading attached to drafts creates no responsibility on the part of the bank; it is not a guaranty that the bills of lading are genuine.[2] "It imported nothing more than that the goods which the bills stated had been shipped were to be held for the payment of the drafts, if the drafts were not paid by the drawees, and that the bank transferred them only for that purpose." [3]

Where a customer instructs a bank to accept bills of exchange drawn against bills of lading, the bank does not have to inquire as to the genuineness of the bills of lading, and though they prove to be forgeries, it may recover the amount paid on the bills of exchange.[4]

A bank that without notice or suspicion of wrong doing receives a draft from the drawer for collection and demands and obtains payment of the same from the drawee, and in good faith pays the proceeds of it to its employer, is not liable to the payor because the latter made payment without consideration and in reliance upon a forged bill of lading which the drawer had attached to and caused to be forwarded with the draft.[5]

§ 226. **Discretion of the Bank in Doubtful Cases.** — If any point of law concerning any act in the business of collection is in doubt by reason of having never been adjudicated upon, if the bank using its best discretion should pursue the course which the courts subsequently declare to be improper and illegal, it will nevertheless be absolved from all liability for the results of its mistake.[1] But if the bank makes a mistake for which it has no

[1a] Bank *v.* Cummings, 89 Tenn. 616, 18 S. W. 115 (1890).

[1b] *Ibid.* Especially when payment has been made a prerequisite to a surrender of the bill of lading. Gulf etc. Ry. Co. *v.* North Texas Grain Co., 32 Tex. Civ. App. 93, 74 S. W. 567 (1903). See Gregg *v.* Bank of Columbia, 72 S. C. 458, 52 S. E. 195, 110 Am. St. Rep. 633 (1905).

[2] Craig *v.* Sibbett, 15 Pa. St. 238; Hunter *v.* Wilson, 19 L. J. Ex. 8; Leather *v.* Simpson, L. R. 11 Eq. 398.

When a bank collects a draft with a bill of lading attached it is not liable for the goods not being as contracted for. Commerce Milling Co. *v.* Morris, 27 Tex. Civ. App. 553, 65 S. W. 1118 (1901).

[3] Goetz *v.* Bank of Kansas City, 7 Sup. Ct. Rep. 318 (1887).

[4] Woods *v.* Thiedemann, 1 H. & C. 478.

[5] Nebraska Hay etc. Co. *v.* First National Bank, 78 Neb. 334, 110 N. W. 1019, 126 Am. St. Rep. 602, 9 L. R. A. (N. S.) 251 (1907).

[1] § 226. Mechanics' Bank *v.* Merchants' Bank, 6 Met. (Mass.) 13;

such excuse, as simply a mistake of misreading, it will not be discharged from its liability to make good the consequent loss.[2] Though of course in this case of a misinterpretation it is to be supposed that, if the writing really appeared so illegible that the mistake was reasonably excusable, *and*, which is essential, the bank by reason of distance and want of time was actually unable to obtain directions or explanations from competent authority, it would be acquitted if it pursued its own best discretion. In the cited case there was obvious negligence on the part of the bank in the reading of the note.

§ 227. **Collections made in the Locus of the Bank.** — The duty of the bank to the holder of the paper which is received for collection differs slightly, according to the character of the paper and the place where it is made payable. First in order will be considered those collections which are to be made in the same place where the collecting bank itself is situated. For the purpose of this discussion it makes no difference whether the bank is itself the owner; or has come by the paper directly from the hands of the owner or his agent; or has received it from a correspondent of its own in some distant place. The only conditions are, that the bank performing the actual collection be situated in the same town where is also the person who is bound to make the payment, or the banking-house at which, by the terms of the instrument, payment is to be made. If the paper be a promissory note, a bill of exchange, or a draft, the duty of the collecting bank is comparatively simple. It must perform the ordinary requirements in the way of presenting for acceptance if the paper ought to be accepted, and of presenting for payment at maturity when such presentment is necessary. But the bank is not liable for neglecting to present a draft where presentment is not necessary for charging any of the parties, and must therefore be legally useless even if made.[1] If either acceptance or payment is refused, the paper must be sent to a notary for protest, provided there is any occasion for having it protested at all.[2] And the bank is liable if, through an erroneous opinion as to the legal character of any especial piece of business paper, though in an unusual form, it does not

National Bank of Commerce *v.* Merchants' National Bank, 91 U. S. 92, 23 L. ed. 208.

[2] Bank of Delaware County *v.* Broomhall, 38 Pa. St. 135.

[1] § 227. Mobley *v.* Clark, 28 Barb. (N. Y.) 390; West Branch Bank *v.* Fulmer, 3 Barr (Pa.) 399.

[2] Georgia National Bank *v.* Henderson, 46 Ga. 487.

cause presentment, demand and protest to be made in the manner which the court holds to be necessary.[3] Though if the person from whom the bank received the paper is immediately accessible, there seems to be no reason why the bank should not be allowed at once to return the paper to him, and leave him to have it protested, if he sees fit. But in such case it is essential that the return can be, and in fact is, accomplished with sufficient despatch to leave him reasonable time for attending to the protesting before it is too late to secure its advantages.

Duty to Present Draft Payable at a Future Day

As it is the duty of the bank as agent to act as a prudent man would in his own affairs, and as it is for the *interest of the holder* of a draft payable at a day certain in the future to present it at once for acceptance, since acceptance binds the drawee, and if it is not accepted the owner has a right of action against the drawer or indorser on notice and protest, without waiting for the day of payment, therefore the bank should present such a draft for acceptance with due diligence.[4]

§ 228. **Notary's Duty.** — "When a note is put in bank for collection, if not paid when due, it is placed in the hands of a notary, whose duty it is to demand payment. If not paid during bank hours of the last day of grace, the notary on the evening of that or on the next day gives notice to all the indorsers if they reside in town, if out of town then by the next mail, and it is not until after all this is done that he returns it to the bank under protest, and notice to the holder is considered no part of his duty." [1]

§ 229. **Presentment for Payment.** — Presentment for payment should be within business hours, and when a note is payable at a bank, that means during its hours of business; but if a demand is made of the officers at the bank after banking hours, and the cashier or teller states that there are no funds, the presentment is sufficient.[1] Demand must be made on the last day of grace,

[3] *Ibid.* But see National Bank of Commerce *v.* Merchants' National Bank, 91 U. S. 92, 23 L. ed. 208.

[4] Lenox *v.* Cook, 8 Mass. 460; Whitehead *v.* Walker, 10 Mees. & Wels. 696; Robinson *v.* Ames, 20 Johns. (N. Y.) 146. See 3 Kent, 94, and Mount *v.* First National Bank, 37 Iowa 457.

[1] § 228. Johnson *v.* Harth, 1 Bail. (S. C.) 463.

[1] § 229. Salt Springs National Bank *v.* Burton, 58 N. Y. 430; First National Bank *v.* Owen, 23 Iowa 185; Flint *v.* Rogers, 15 Me. 67.

in business hours; a demand on any previous day is too soon to bind the indorser.[2]

Days of Grace

The general usage is to allow three days' grace, but this rule may be varied by custom in a particular locality which entered into the contract of the parties,[3] or by express agreement.

§ 230. **Place of Presentment.** — The presentation of a draft for payment at the place of its date is a sufficient demand to charge the drawer or acceptor after notice of protest, where the place at which it was payable is not stated in the writing, and no proof made that any particular place was agreed on.[1]

When a bill or note made payable at a bank is present there, with the knowledge of the bank, and ready to be delivered upon payment, such mere presence is a sufficient demand; and if business hours pass and it is not paid, it is deemed to be dishonored and notice must be given.[2] And the same rule holds as to any place at which paper is made payable;[3] mere presence, if known, is enough, and it is not necessary even that it should be in possession of the proper officer.[4] If it belongs to the bank, the law presumes its presence there until disproved.[5] Mere physical presence in the bank unknown to the officers, as where the letter containing the bill slipped through a crack in the cashier's desk, is not sufficient; the bill is not ready to be delivered on payment.[6]

Where the maker and indorser of a note know that the bank having the note for collection has made the office of another bank its own for discount, deposit, etc., and put its notes held for collection into the hands of this other bank, demand at said office is sufficient.[7]

[2] Farmers' Bank *v.* Duvall, 7 Gill & Johns. (Md.) 78.

[3] Bank of Columbia *v.* Magruder, 6 Harr. & Johns. (Md.) 180; Renner *v.* Bank of Columbia, 9 Wheat. 581, 6 L. ed. 166. See Usage.

[1] § 230. Wittkowski *v.* Smith, 84 N. C. 671 (1881).

[2] Bank of United States *v.* Carneal, 2 Pet. 543, 7 L. ed. 514; Chicopee Bank *v.* Philadelphia Bank, 8 Wall. 641, 19 L. ed. 422; Folger *v.* Chase, 18 Pick. (Mass.) 63.

[3] Hunt *v.* Maybee, 3 Seld. (N. Y.) 266.

[4] Folger *v.* Chase, 18 Pick. (Mass.) 63; State Bank *v.* Napier, 6 Humph. (Tenn.) 270.

[5] See cases quoted in notes 1 and 3.

[6] Chicopee Bank *v.* Philadelphia Bank, 8 Wall. 641, 19 L. ed. 422.

[7] Crews *v.* Farmers' Bank, 31 Gratt. (Va.) 348.

§ 231. **Usage as Altering the Rules as to Place of Presentment.** — A custom prevails in some places for a bank to send notice by mail to the payor a little before maturity, requesting him to come and settle at the proper time. As applied to paper made payable at the bank, of course there is no difficulty, the law being as above; but as to paper not in terms payable there trouble appears when a bank undertakes to substitute such a custom of presenting by such notice, instead of making demand upon the payor as the general rules of the law merchant require. In Massachusetts the usage is so general as to have become a part of the law in reference to which parties are presumed to contract.[1] So in Maine, but Maryland and New Hampshire *contra*.[1]

Upon principle, if the usage were prevalent generally among the banks of a given place, it should bind persons of the place, provided the paper is payable in that place.[2] But if the usage is that of a particular bank only, it is difficult to see on what ground a party who has not contemplated that bank as a factor in the matter can be held by such a custom, merely because some holder has selected that bank to act for him in collection.[3] It should be shown that the party knows of the usage of the bank, and had reason to suppose the bank would act in the matter in order to hold a party who has not selected or adopted that bank to act in collecting the bill, for nothing less will lay a foundation for a reasonable inference that such party contracted in reference to such usage. The case is entirely different from those in which the bill is made payable at a particular bank, for then the parties to the bill are dealers with the bank, and bound by its usages, whether known to them or not.[4] See §§ 9, 221.

A note was made payable to a certain bank or order, as if for discount by that bank. It was not discounted there, however; but was sold to another party, who deposited it in the bank. It was held that the sureties were liable to pay it.[5]

[1] § 231. Whitwell *v.* Johnson, 17 Mass. 449; Grand Bank *v.* Blanchard, 23 Pick. (Mass.) 305; Marine Bank *v.* Smith, 18 Me. 99. *Contra*, Farmers' Bank *v.* Duvall, 7 Gill & J. (Md.) 78; Moore *v.* Waitt, 13 N. H. 415.

[2] Adams *v.* Otterback, 15 How. (S. C.) 539; Renner *v.* Bank of Columbia, 9 Wheat. 587, 6 L. ed. 166; Dorchester & Milton Bank *v.* New England Bank, 1 Cush. (Mass.) 177.

[3] See notes 1 and 2, and Pearson *v.* Bank of Metropolis, 1 Pet. 89, 7 L. ed. 65.

[4] Mills *v.* Bank of U. S., 11 Wheat. 431, 6 L. ed. 512.

[5] Ward *v.* Northern Bank, 14 B. Monr. (Ky.) 351.

Sending a check by post to the drawee is a good presentment; but if the money does not come back by the return mail, notice of dishonor should be given.[6]

Where A. delivers a certificate of deposit to a bank to be collected from a bank in another place without any inquiry as to the methods of collection, there is an implied understanding that the established usage in making collections will be followed; and if the bank to which it is delivered, acting accordingly and in the exercise of due care, mails the certificate to the payor bank, and receives the latter's check on a bank in a third place, it will not be liable to the owner of the certificate if the payor bank becomes insolvent before presentation of the check.[6a]

If a bill of exchange is presented through a banker, one more day is allowed for *giving notice of dishonor* than would be allowed if it were presented by the party himself. But no additional time is allowed for *presentment for payment*.[7]

If a note be payable at a particular bank, and at maturity the bank has no place of business and another occupies its room, it is sufficient to present it for payment at such room.[8]

§ 232. **Notice of Dishonor.** — Where a bank, not upon its own account but as agent for collection, holds indorsed paper of any description which is dishonored, it has been questioned to whom it is bound to give notice of the dishonor, — whether only to its own principal, that is to say, the party from whom it received the paper, or to the makers and all the indorsers thereon. The decisions have not from the outset been perfectly harmonious. But the doctrine that the duty extends to the notification of any persons behind the party recognized by the bank as its immediate principal is comparatively little supported. The chief authority is the New York case of Smedes *v.* The Bank of Utica.[1] But in this case there was evidence, which the court deemed satisfactory, of an established custom and general understanding to this effect in New York, and it was strictly upon this evidence that the decision was really based; though the judge intimated that, if this proof had been omitted, it was possible that the court might have

[6] Bailey *v.* Bodenham, 10 L. T. N. S. 422; 12 W. R. 865.

[6a] Farmers' Bank and Trust Co. *v.* Newland, 97 Ky. 464, 31 S. W. 38 (1895).

[7] Alexander *v.* Burchfield, Car. & M. 75; 3 Scott N. R. 555; 7 M. & G. 1061.

[8] Lane *v.* Bank of West Tennessee, 9 Heisk. (Tenn.) 419 (1872).

[1] § 232. 20 Johns. (N. Y.) 372; 3 Cow. (N. Y.) 662.

taken judicial cognizance of the usage. Thus this ruling really is entitled to no weight in a discussion of the general principle of the law; and even the judge's remark serves only to show how universal and notorious was the usage in his own State, and has not at all, and does not communicate to the ruling, the character of a general principle. The language of the court in a few other cases, more especially in McKinster *v.* Bank of Utica,[2] Fabens *v.* Mercantile Bank,[3] Bank of Washington *v.* Triplett,[4] and West Branch Bank *v.* Fulmer,[5] has been regarded as sustaining the same view. The language used might induce the citation of these causes as authorities, but they can serve only as very weak ones, and perhaps it would hardly be an unfair statement to say that, so far as they bear upon this precise point, they contain little, if anything, more than *obiter dicta*.[6] On the other hand, the authorities which take the opposite view are numerous, direct and weighty.[7] Among them, as cited in the margin, it will be noticed that there are other cases decided in New York; and especially should be noted one, later in date than any of those to the contrary effect occurring in the decisions in the same State. Therein the court acknowledged that the question whether, where the note is sent for collection merely, it is a presumption of law that the collecting agent will notify *all* parties, is one of much embarrassment, and not clearly settled in New York. Previous cases in the State, being those just cited, have arisen between a holder and an early indorser, and concern the point whether such indorser could be held by virtue of a series of notices sent day by day by each indorser in turn to his predecessor. But the discussion has never arisen directly between the holder and the collecting agent, where the right of the former

[2] 9 Wend. (N. Y.) 46; 11 *id.*, 473.

[3] 23 Pick. (Mass.) 330.

[4] 1 Pet. 25, 7 L. ed. 37.

[5] 3 Barr (Pa.) 399.

[6] See also Curtis *v.* Leavitt, 15 N. Y. 9; Montgomery County Bank *v.* Albany City Bank, 3 Seld. (N. Y.) 460; Foster *v.* Essex Bank, 17 Mass. 479; Blakeslee *v.* Hewett, 76 Wis. 341, 44 N. W. 1105.

[7] State Bank *v.* Bank of the Capitol, 41 Barb. (N. Y.) 343; Bank of United States *v.* Goddard, 5 Mason 366; Phipps *v.* Millbury Bank, 8 Met. (Mass.) 79; Colt *v.* Noble, 5 Mass. 167; Eagle Bank *v.* Chapin, 3 Pick. (Mass.) 180 (see comments upon this case, made by the court in Phipps *v.* Millbury Bank, *supra*); Mead *v.* Engs, 5 Cow. (N. Y.) 303; Howard *v.* Ives, 1 Hill (N. Y.) 263; Spencer *v.* Ballou, 18 N. Y. 327; Farmers' Bank *v.* Vail, 21 *id.*, 485 (cited in 41 Barb. 343, *supra*); Bank of Mobile *v.* Huggins, 3 Ala. 206; Branch Bank *v.* Knox, 1 *id.*, 148. So the English case of Haynes *v.* Birks, 3 Bos. & P. 599. See also Bank of United States *v.* Davis, 2 Hill 451; Carpenter *v.* National Shawmut Bank, 187 Fed. 1 (1911); Gleason *v.* Thayer, 87 Conn. 248, 87 Atl. 790 (1913).

to recover from the latter has turned upon whether or not the latter had contracted, as part of his undertaking to collect, to notify all the indorsers. After a careful consideration of all the precedents, the court conclude that the collecting bank need notify only its own principal, from whom it has immediately received the paper. In the case cited from Mason's Reports the matter is subjected to a very thorough and satisfactory discussion, as it is also in the case of Phipps *v.* Millbury Bank. Where the weight of opposing authorities is so very disproportionately balanced, and especially where the latest among the authorities all consistently incline in favor of the doctrine which was already the stronger, it can hardly be considered that the true rule is any longer open to doubt. It must be assumed now to be law that the notification to the principal — *i.e.* to the immediate predecessor in possession, the party from whom the bank receives, no matter what may be the nature of the title or interest of that party to or in the paper — is sufficient to acquit the bank. But though this is settled as the general rule, it is of course open to material variation from extrinsic causes. A special agreement, express or implied, between the bank and its principal, may require notice to be given to all the parties, or to any particular party, on the paper. So a local usage, as in New York City, or the usage of the collecting bank, to notify indorsers or makers, may render it obligatory upon the bank to do so, as a part of the contract of collection. There can be no question that the court in the case of Smedes *v.* Bank of Utica was right in admitting evidence of such usage; and, of course, also in being governed by it, since it was sustained by satisfactory proof. None of the cases in which this decision has been since commented upon, and which in the absence of proof of usage have laid down an opposite doctrine, have criticised the correctness of the course then pursued in this matter. On the contrary, they have by plain implication approved it.

Evidence of an Agreement to Notify All

(*a*) It should seem, too, that the bank ought to choose distinctly between the two courses. For if it undertakes to notify all the parties, and does not do so properly, it is at least possible that it might be held responsible for the loss arising from the insufficiency. Certainly the fact of its undertaking to notify all would be very strong evidence that the notification of all was under-

stood to be a part of the contract. Indeed, it has been held that the fact of notification to a part only of the indorsers was admissible in evidence, as going to show an agreement to notify all, and the court only restricted its force by saying that it was not conclusive to this effect.[8]

When Notice is to be Given

(*b*) Each transferee of a check has one day allowed him in which to give notice of its dishonor to his transferrer. Nor does it make any difference that any one or more of the transferees are parties who have been simply organs of transmission without any actual interest in the check.[9]

Notice of dishonor may be given at once, on refusal to pay upon demand in business hours of the last day of grace; it is not necessary to wait till the day is done.[10]

If notice of dishonor is not given to an indorser after being instructed to do so by the drawer who has left with the bank the indorser's name and the place to which the notice is to be sent the bank is liable for all resulting damages.[10a]

Excuse

(*c*) No notice need be given if the party has actual knowledge of the fact to be notified.[11]

§ 233. **Manner of Notice.** — The general rule is that personal notice must be given to a party in the same place as the bank,[1] but a mailed notice is sufficient if such is the usage of the bank

[8] State Bank *v.* Bank of the Capitol, 41 Barb. (N. Y.) 343.

[9] Prideaux *v.* Criddle, L. R. 4 Q. B. 455; Burnham *v.* Webster, 19 Me. 232. See Jefferson County Sav. Bank *v.* Hendrix, 147 Ala. 670, 39 So. 295, 1 L. R. A. (N. S.) 246, n. (1905).

[10] Farmers' Bank *v.* Duvall, 7 Gill & Johns. (Md.) 78.

If notice is not given until after the drawee's insolvency the bank is liable, not for the full amount of the check but only for the actual amount of the loss sustained which must be specially averred and proved. Jefferson County Sav. Bank *v.* 147 Ala. 670, 39 So. 295, 1 L. R. A. (N. S.) 246, n. (1905); Hendrix, *v.* Jefferson County Sav. Bank, 153 Ala. 636, 45 So. 136, 14 L. R. A. (N. S.) 686 (1907).

[10a] Howard *v.* Bank of Metropolis, 95 App. Div. 342 (1904), 88 N. Y. S. 1070; *id.*, 115 App. Div. 326 (1906), 100 N. Y. S. 1003.

[11] West Branch Bank *v.* Fulmer, 3 Pa. St. 399.

[1] § 233. When an indorser dwells in the same post-office delivery, the notice must be personal, or left at his residence or place of business. Forbes *v.* Omaha National Bank, 10 Neb. 338, 6 N. 393; Louisiana State Bank *v.* Rowel, 6 Mart. (La.) 506; Babcock *v.* Benham, 4 Hill (N. Y.) 129.

at which a note is payable;[2] and an indorser (A.) who receives notice by mail may forward notice to his indorser (B.) by mail, if he does it the same day, so that it would reach his indorser the same day he would have received the notice sent to A. if it had been originally addressed to B. instead of to A.[3] In Alabama, notice that may be sent by mail under the law merchant is sufficiently addressed if sent to the residence or post-office nearest the residence of the party to be charged at *the time he became a party,* without regard to his residence at the time of notice.[4]

When the protest is made at a different place from that where the parties reside, the mail may be properly used.[5]

Test of Difference in Place

(*a*) As to the test of difference in place, the United States Supreme Court holds that, even though the parties get their mail at the same post-office, yet if the party to be notified has no residence nor place of business in the town, but lives two or three miles in the country, the mail may be used.[6] Other authorities make the post-office the test; if the parties get their mail at the same post-office, the mail is not to be used (unless the place of payment is elsewhere), for the post is not to be made a place merely of deposit, and is only properly used for transportation;[7] this, however, is of course subject to exception where a postal delivery[8] exists in the city where the parties live, or where it is

[2] And what is its usage is a question of fact for the jury. Carolina National Bank *v.* Wallace, 13 S. C. 347 (1879). See Gindrat *v.* Mechanics' Bank, 7 Ala. 324; Usage, § 9. The parties to a note payable at a bank are dealers with the bank, and bound by its custom as to notifying by mail. Chicopee Bank *v.* Eager, 9 Met. (Mass.) 583; Mills *v.* Bank of United States, 11 Wheat. 431, 6. L. ed. 512.

[3] United States National Bank *v.* Burton, 58 Vt. 426; Manchester Bank *v.* Fellows, 28 N. H. 302; Shelburne Falls National Bank *v.* Townsley, 102 Mass. 177.

[4] John *v.* City National Bank of Selma, 57 Ala. 96 (1876).

[5] Hartford Bank *v.* Stedman, 3 Conn. 489; Greene *v.* Farley, 20 Ala. 322; Eagle Bank *v.* Hathaway, 5 Met. (Mass.) 212; Warren *v.* Gilman, 17 Me. 360.

[6] Bank of Columbia *v.* Lawrence, 1 Pet. 578, 7 L. ed. 269.

[7] Eagle Bank *v.* Hathaway, 5 Met. (Mass.) 212; Shelburne Falls National Bank *v.* Townsley, 102 Mass. 177; Louisiana State Bank *v.* Rowel, 6 Mart. (La.) 506.

[8] Shoemaker *v.* Mechanics' Bank, 59 Pa. St. 83; Walters *v.* Brown, 15 Md. 292.

the usage [9] of a bank to deposit notice in the post-office, as such a usage will bind those dealing with the bank.

§ 234. **Waiver of Demand and Notice. Insolvency no Excuse.** — Indorser's acknowledgment of "the receipt of notice of protest on the within note" (a note delivered to a savings bank as collateral security for a previous loan) was held to release the bank from all obligation to demand payment or give notice of non-payment.[1]

(*a*) Insolvency of the drawee will not excuse failure to present for payment or acceptance, or failure to give notice of non-payment or non-acceptance. From friends or unknown resources the drawee may have power to pay, and only when a party cannot possibly be damaged by the want of due presentment or notice is the failure excused. The mere fact that he has not been injured is no defence, if he *might* have been damaged by the omission.[2]

§ 235. **Collections that are not to be made in the Locus of the Bank.** — When the paper is payable in some other place than that in which the bank is located, its duty is (1st) to forward the bill, or note, or check in proper season, to a sub-agent selected with due care; (2d) to send to such agent any instructions bearing upon its duty that may have been received from the depositor (§ 224); and (3d) to make inquiry with due diligence if notice of the arrival of the paper does not come to it within such time as it might reasonably be expected. See §§ 235, 252 *d*.

§ 236. **Selection of Sub-agent.** — The bank's duty is to use every reasonable precaution, so far at least as its own action is concerned, to secure the collection, if possible; and, failing in this, the prompt and accurate performance of all the items connected with the protest. It must therefore either transmit to a bank in good standing, or hand over to a notary in good repute, as the

[9] Chicopee Bank *v.* Eager, 9 Met. 583; Mills *v.* Bank of U. S., 11 Wheat. 431, 6 L. ed. 512.

[1] § 234. City Savings Bank *v.* Hopson, 53 Conn. 453 (1885), 5 Atl. 601.

[2] 1 Parsons on Notes, 446, 528, 551, 630; Story on Notes, 286, 367; Story on Bills, 318, 326, 346; Daniel on Neg. Inst., 1171, 1172; Chitty on Bills, 354, 396, 490; Smith *v.* Miller, 52 N. Y. 545; Welch *v.* Taylor Manuf. Co., 82 Ill. 579; Hawley, Dodd, & Co. *v.* Jette, 10 Or. 36.

Where the bank was in default in presentation and protest, it was held that, in a suit for damages by the owner of the note, the bank might show that the maker of the note was insolvent, and that there had been no real loss to the holder; but evidence only that the maker was in embarrassed circumstances was declared inadmissible. Steele *v.* Russell, 5 Neb. 211.

case may be. And if it be proved to have been careless in the choice of the agent, and to have selected one which it knew or ought to have known to be an improper one, it will be answerable for the injury resulting therefrom.[1] Ordinarily, of course, it will be very strong evidence of due care on the part of the bank if it is shown to have selected the agent which it is wont to employ for the transaction of its own business of the same nature,[2] and the courts are accustomed to speak of such evidence as if it were substantially conclusive. Generally it may be thus regarded, but it is clearly possible that a bank may be shown to be culpably remiss in the selection of its own agents, and then the fact that the agent was employed in its private affairs would be no excuse for the employment of the same agent in the affairs of the customer. The contract is not that the bank shall employ its own usual agents, but that it shall employ proper agents.

By the custom of London bankers, when a foreign check is paid to a banker by a customer, if the banker has no agent at the place where the check is payable, he sends it direct to the banker on whom it is drawn, demanding payment, and the banker immediately either remits the money or returns the check.[3]

Not Proper to Employ an Agent with a Manifest Adverse Interest. But see New York Case in (b)

(*a*) But in this country the party who is to pay a check is not a suitable agent for its collection.[3a] The sender is guilty of negligence,[3b] and custom is no defence.[3c]

[1] § 236. Fabens *v.* Mercantile Bank, 23 Pick. (Mass.) 330; Ætna Insurance Co. *v.* Alton City Bank, 25 Ill. 243; Stacy *v.* Dane County Bank, 12 Wis. 629; Bellemire *v.* United States Bank, 4 Whart. (Pa.) 105; Bowling *v.* Arthur, 34 Miss. 41; Bank of Rocky Mount *v.* Floyd, 142 N. C. 187, 55 S. E. 95 (1906); Farley National Bank *v.* Pollock, 145 Ala. 321, 39 So. 612, 117 Am. St. Rep. 44, 2 L. R. A. (N. S.) 194, n. (1905); Second National Bank *v.* Merchants' National Bank, 111 Ky. 930, 65 S. W. 4, 98 Am. St. Rep. 439, 55 L. R. A. 273 (1901).

[2] Warren Bank *v.* Suffolk Bank, 10 Cush. (Mass.) 583; Hyde *v.* Planters' Bank, 17 La. 560; Baldwin *v.* Bank of Louisville, 1 La. Ann. 13.

[3] Heywood *v.* Pickering, Law R. 9 Q. B. 428 (1874).

[3a] First National Bank *v.* Bank of Whittier, 221 Ill. 319, 77 N. E. 563 (1906); Bank of Whittier *v.* First National Bank, 124 Ill. App. 102 (1905).

[3b] Smith *v.* National Bank, 191 Fed. 226 (1911).

[3c] Bank of Rocky Mount *v.* Floyd, 142 N. C. 187, 55 S. E. 95 (1906); Pickett *v.* Baird Investment Co., 22 N. D. 343, 133 N. W. 1026 (1911); Winchester Milling Co. *v.* Bank of Winchester, 120 Tenn. 225, 111 S. W. 248, 18 L. R. A. (N. S.) 441, n. (1907); Pinkney *v.* Kanawha Valley Bank,

A Chicago bank received a certified check for collection, and sent it to the drawee bank. The latter mailed in return a worthless draft, surrendered the check to the drawer as paid, failed, and closed its doors. The Chicago bank was liable to the depositor for the full amount of the check. The debtor cannot be the disinterested agent of the creditor to collect the debt, and it cannot be considered reasonable care to select an agent known to be interested against the principal, to put the latter into the hands of his natural adversary; surely it is not due care in one holding a promissory note for collection to send it to the debtor, trusting him to pay, delay, or destroy the evidence of debt, as his conscience may permit. With especial force does this reasoning apply to the case of a certified check, for on that the bank is primarily liable.[4]

68 W. Va. 254, 69 S. E. 1012, 1912B Ann. Cas. 115, n.; Morris-Miller Co. *v.* Von Pressentin, 63 Wash. 74, 114 Pac. 912 (1911).

Custom is unreasonable even though the drawee is the only bank in the place. Winchester Milling Co. *v.* Bank of Winchester, *supra;* Pinkney *v.* Kanawha Valley Bank, *supra;* Farley National Bank *v.* Pollock, 145 Ala. 321, 39 So. 612, 117 Am. St. Rep. 44, 2 L. R. A. (N. S.) 194, n. (1905); Jefferson County Sav. Bank *v.* Hendrick, 147 Ala. 670, 39 So. 295, 1 L. R. A. (N. S.) 246, n. (1905). But see Hilsinger *v.* Trickett, 86 Ohio St. 286, 99 N. E. 305, 1913D Ann. Cas. 421, n.; Youmans *v.* Blackshear Bank, 141 Ga. 357, 80 S. E. 1005 (1913); Wilson *v.* Carlinville National Bank, 187 Ill. 222, 58 N. E. 250, 52 L. R. A. 632 (1900).

Of course there can be no complaint if the drawer and holder have consented to such sending. First National Bank *v.* First National Bank, 127 Tenn. 205, 154 S. W. 965 (1912); or if no damage has resulted. Morris-Miller Co. *v.* Von Pressentin, 63 Wash. 74, 114 Pac. 912 (1911).

The indorser of paper so sent will not be discharged where no prejudice has resulted. Plover Savings Bank *v.* Moodie, 135 Iowa 685, 110 N. W. 29 (1907); Citizens' Bank *v.* First National Bank, 135 Iowa 605, 113 N. W. 481, 13 L. R. A. (N. S.) 303, n. (1907).

When such agent performs the dual function of collecting and crediting, the transaction is closed and in the absence of fraud or mistake is equivalent to payment. American National Bank *v.* Milles, 229 U. S. 517, 57 L. ed. 1310, 33 Sup. Ct. 883 (1903). See also Winchester Milling Co. *v.* Bank of Winchester, 120 Tenn. 225, 111 S. W. 248, 18 L. R. A. (N. S.) 441, n. (1907).

[4] Drovers' National Bank *v.* Anglo-Amer. P. & P. Co., 117 Ill. 100, 7 N. E. 601 (1886); Bank of Rocky Mount *v.* Floyd, 142 N. C. 187, 55 S. E. 95 (1906).

While a bank in forwarding paper for collection to its correspondent is not required to inquire who its officers are before sending the paper, when it does actually know that the cashier is to collect the note from himself and the paper is not paid or heard from after maturity, inquiry should be made promptly, especially in a time of financial pressure, and notice given to the depositor without unreasonable delay. Second National Bank *v.* Merchants' National Bank, 111 Ky. 930, 65 S. W. 4 (1901).

(*b*) Pennsylvania also holds that a bank on which a check is drawn, though not certified, is not a suitable agent for its collection.[5]

In New York[6] it has been held that the bank at which a note is payable is a suitable agent to collect it from the maker; such a bank has no primary liability, and this in case there was no indorser except the maker. It was not a claim against the bank, and the court found that it was a usual method of business to send by mail, and that whether it was or was not negligence to send to that bank at which the note was payable, it was *clear that no injury resulted from it in this case; the damage would have arisen just the same if a third party had been agent.*

(*c*) It is not a reasonable usage to send the draft to the drawee, and run the risk of receiving worthless paper in return, and of sacrificing the claims of the owner on prior parties.[7] An independent agent should be selected, and he should take nothing but money, unless he has authority to do otherwise.

§ 237. **Collection of Checks.** — Where the instrument received for collection is a check, the duties of the bank become somewhat more complicated, at the same time that a more correct understanding of them is rendered vastly more important by reason of the immense amount of business of this description which all banks are obliged to transact. Every bank of deposit in the country is wont daily to receive from its customers upon deposit for their credit great numbers of checks drawn upon other banks. Whenever a check is deposited, and credit therefor is given on the depositor's check-book, the memorandum may be subsequently cancelled if the collection should not be accomplished in due course.[1] If

[5] Merchants' National Bank *v.* Goodman, 109 Pa. St. 422, 2 Atl. 687.

[6] Indig *v.* City Bank, 80 N. Y. 100. See also Western Wheeled Scraper Co. *v.* Sadilek, 50 Neb. 105, 69 N. W. 765 (1897); First National Bank *v.* City National Bank, 12 Tex. Civ. App. 318, 34 S. W. 458 (1896); German National Bank *v.* Burns, 12 Colo. 539, 21 Pac. 714; Wagner *v.* Crook, 167 Pa. St. 259, 31 Atl. 576; First National Bank *v.* Fourth National Bank, 56 Fed. 967; Anderson *v.* Rodgers, 53 Kan. 542, 36 Pac. 1067 (1894), citing Bank *v.* Ober, 31 Kan. 599, 3 Pac. 324.

In making the payee bank an agent to collect the holder takes the risk of loss resulting from the latter's negligence. Baldwin's Bank *v.* Smith, 215 N. Y. 76, 109 N. E. 138 (1915).

[7] Whitney *v.* Esson, 99 Mass. 311; Bank of Rocky Mount *v.* Floyd, 142 N. C. 187, 55 S. E. 95 (1906). *Contra*, see Farmers' Bank and Trust Co. *v.* Newland, 31 S. W. 38 (1895). See Hilsinger *v.* Trickett, 86 Ohio St. 286, 99 N. E. 305, 1913D Ann. Cas. 421, n.

[1] § 237. National Gold Bank *v.* McDonald, 51 Cal. 64; Midland National Bank *v.* Brightwell, 148 Mo. 358, 49 S. W. 994 (1898); Falls

circumstances should cause the obligation in any particular transaction to run to any person or party other than the one from whom the bank receives the check, the nature of the obligation is not thereby substantially affected; certainly it can never be increased.

The duty of the bank is still precisely the same duty, though it may prove that a true owner, not at first known to the bank, is the party who is really entitled to claim a performance of that duty, or damages for its breach. For the sake of brevity, we will hereafter designate the person, whoever he may be, to whom the obligation of the bank runs, as the depositor or the customer.

§ 238. **Distinction between the Duty of the Bank to the Customer and the Duties existing between other Parties.** — It is necessary in the outset thoroughly to disembarrass the relation of the bank to the customer, and consequently the whole matter of the duties and liabilities of the bank in the premises form two wholly distinct and alien subjects; to wit, the relation of the payee, owner, or holder of the paper to the maker, drawer, or acceptor thereof; and the relation of the party giving it in charge to the bank to any other person standing earlier in the progression of title. With the two last mentioned considerations the collecting bank has nothing whatsoever to do; it may ignore them utterly; in fact, oftentimes it may even be incumbent upon it to ignore them utterly, for they may be rendered by circumstances in any particular case inconsistent with its own different, peculiar, and wholly independent obligations in the business.

The reiteration of this doctrine must be pardoned by reason of its importance. The common law, speaking through a great multitude of decisions, has laid down the rules which govern the presentment of checks as between the drawer, the indorsers, and the various subsequent holders; and there is complication enough in the topic. The common law has, in like manner, laid down the principles controlling the presentment of checks by a collecting bank as between the bank and the depositor; and in this topic also there is independent and ample complication. The entanglement of the two would result in a senseless and inextricable confusion. If, then, one deposits a check in a bank, there is a certain time within which the bank is bound to that depositor to present

City Woolen Mills *v.* Louisville National Bank, 145 Ky. 64, 140 S. W. 66 (1911).

the check to the drawee for payment. It may be that a presentment within a shorter limit of time would be necessary to enable the payee to hold the drawer, or to enable the holder to hold his indorser, in case of non-payment; or it may be that presentment after that time would suffice for both these purposes. Neither of these facts modifies or affects the time within which the bank is bound *to its customer* to present. By the ordinary rule of common law, this time is until the close of banking hours on the business day next following that on which the bank comes into possession of the check.[1] This is the general rule, and of course is liable to occasional modifications, which will be noticed hereafter.

§ 239. It may be well to illustrate more fully the principles above laid down; for they are fundamental and important. A. and B. are both living in the same town, and keep their bank accounts at the C. and D. banks respectively, also in the same town. A. gives his check upon the C. bank to B. on Monday. B. deposits it in the D. bank on Tuesday. The D. bank presents it for payment to the C. bank on Wednesday. In this case the D. bank will have done its full duty by B. under the rule of the common law above laid down. It will have presented for payment on the day after it received the check. So, if the C. bank were paying checks all day Tuesday, but stopped payment on Wednesday morning, B. would have no remedy against the D. bank for laches or neglect of duty. Neither could he look to A.; for A. had a right to have payment of his check demanded upon Tuesday, and depositing it in the bank could not be allowed to extend his risk over Wednesday also. If A. did not wish, or was not able, to deposit on Monday, he should either have made demand himself on Tuesday, instead of depositing, or he should have deposited under a special agreement with his bank that it was either to demand payment on Tuesday, or else itself to assume the risk of the customary postponement till the following day. In like manner, if A. and B., and their respective banks, were in two distant towns, and A. delivered or sent to B. his check, the common law would declare in what manner and within what time

[1] § 238. Byles on Bills, p. *20; Boddington *v.* Schlencker, 4 B. & Ad. 752; 1 Nev. & Man. 540; Alexander *v.* Burchfield, Car. & M. 75; 3 Scott, N. R. 555; 7 Man. & Gr. 1061; Hare *v.* Henty, 10 C. B. N. S. 65; Rickford *v.* Ridge, 2 Camp. 537; Moule *v.* Brown, 4 Bing. N. C. 266; 5 Scott 694; Martin *v.* Home Bank, 30 App. Div. 498 (1898).

B. must despatch his check to the C. bank for payment. The cases generally hold that the check must be mailed so as to go by the mail of the day following its receipt, in ordinary cases. But this is the rule as between A. and B. only, and the breach of it would only operate to imperil B.'s right of action against A. But if B. deposits in his bank, his bank has the right to forward the check to the C. bank through its wonted channel of correspondence; and it is not ordinarily obliged to start it upon this progress until the day after it receives it. See § 245.

§ 240. **Time of Presentment of Checks.** — A check must be presented within a reasonable time, which is settled in ordinary cases to be before close of business hours on the day following its receipt.[1]

Check Taken by Agent

But "when a check is taken instead of money, by one acting for others, a delay of presentment for a day, or for any time beyond that within which with proper and reasonable diligence it can be presented, is at the peril of the party thus retaining the check and postponing presentment, as between him and the persons in interest whom he represents." [2] And where loss occurs because such a check is not presented on the day of its reception, the agent is liable.[3]

Lord Ellenborough

Lord Ellenborough well said that it would be impossible for any banker, receiving checks by mails due at various hours all through the day, to keep an army of clerks ready to present them, or forward them, all upon the day of receipt. "Bankers would be kept in a continual fever, if they were obliged to send out a check the moment it is paid in." The arrangement of presenting or forwarding on the next following day "appears sub-

[1] § 240. Burkhalter *v.* Second National Bank, 42 N. Y. 538; Turner *v.* Bank of Fox Lake, 3 Keyes (N. Y.) 425; 23 How. Pr. (N. Y.) 399; Turner *v.* Wislon, 11 Met. (Mass.) 51; Plover Savings Bank *v.* Moodie, 135 Iowa 685, 110 N. W. 29 (1907).

[2] Smith *v.* Miller, 43 N. Y. 176. See next note.

[3] First National Bank *v.* Fourth National Bank, 77 N. Y. 320; 89 *id.*, 412; Bank of New Hanover *v.* Kenan, 76 N. C. 340; Bank of Mount Airy *v.* Greensboro Loan etc. Co., 159 N. C. 85, 74 S. E. 747 (1912); Standish Trust Co. *v.* Commercial National Bank, 166 N. C. 112, 81 S. E. 1074 (1914); Bank of Commerce *v.* Miller, 105 Ill. App. 224 (1912).

servient to general convenience, and not contrary to the law merchant, which merely requires checks to be presented with reasonable diligence." [4]

Time of Forwarding

§ 241. In like manner, each bank in the chain of progress has a right to delay forwarding until the business day next following the day of its own receipt. So if C. bank and D. bank are in two provincial towns, and D. bank has no correspondent in the place where C. bank is situated, it may send to its correspondent in the nearest large town or city whose facilities for collecting from C. bank are, or might reasonably be supposed to be, greater and more available. This course of proceeding on the part of B.'s bank may be perfectly sufficient as an acquaintance of its duty and liability to B. Yet it may also be perfectly consistent with B.'s loss of his remedy against A. in case payment of the check should be lost by reason of its arriving at C. bank later by this process than it would have arrived if sent according to those ordinary requirements of the common law which govern the relations of drawer and payee. It will be seen, therefore, that the deposit of a check in the holder's bank for collection may in a certain conjunction of circumstances result in his total loss of the amount, without any right of action against any person or corporation for reimbursement. Several facts must combine, it is true, to produce this conjunction, to wit: first, the presentment by the collecting bank to the drawee bank for payment must be later than it would have been had the ordinary rule of presentment as between drawer and payee been followed; second, it must appear that the check would have been paid had it been presented within the time set by this rule, or, at least, that the bank was paying during that time, and that the drawer's account was good for the sum called for; third, payment must be refused, and the refusal must be by reason of the failure of the bank occurring subsequent to such time and before actual presentment, or by some other like reason beyond the control of the drawer.

Time Rule Varied

§ 242. But the common rule giving to the bank the whole of the day following its receipt of the check is liable to be materially

[4] Rickford *v.* Ridge, 2 Camp. 537.

qualified through various causes. The time may be shortened or extended, either (1) by express instructions given by the depositor, or an express understanding had between him and the bank, in reference to the particular transaction;[1] or (2) by the uniform course of dealing previously pursued between himself and the bank in the conduct of similar business; or (3) by the known usage of the individual bank in such matters, provided the usage is one which the courts can properly sustain; or (4) by the general usage of banks and custom of the banking business in the city or town where the bank is situated.

§ 243. **Bank liable for Loss resulting from Failure to follow the Usual Course.** — The customer is entitled to expect and require of his bank that it shall not capriciously or needlessly deviate from the established system, whatever that may be; and if it does so deviate, and a loss is the result, he may look to the bank for compensation. For example, if the bank neglects to send the check through the clearing-house at the customary time and in the ordinary manner, and elects rather to keep it till a later hour and present it at the counter, then, if it would have been paid through the clearing-house but is refused at the counter, this conduct of the bank, being contrary to its wont in such business, will render it liable to the depositor of the check for its amount.[1] But the bank must always make the presentment directly to the drawee, and cannot send it through other banks or agents of any description, presentment through the clearing-house being for this purpose a presentment direct to the drawee. There can be no real necessity for the employment of any intermediate agencies, where the collecting bank and the drawee bank are both in the same place. If the collecting bank, without distinct permission, sees fit to have recourse to them, it does so at its own risk of all the consequences which may result.[2] This rule of course does not operate to abridge the rights of banks to make any of those

[1] § 242. In New York, "peculiar circumstances" together with the *knowledge and concurrence of the depositor* were held to justify a delay in presentment by the collecting bank. Jacobsohn *v.* Belmont, 7 Bosw. (N. Y.) 14. See Elliott *v.* Peet, 192 Fed. 699 (1912).

[1] § 243. Boddington *v.* Schlencker, 4 B. & Ad. 752; Alexander *v.* Burchfield, Car. & M. 75.

The bank may show that no loss has resulted. Fort Dearborn National Bank *v.* Security Bank, 87 Minn. 81, 91 N. W. 257 (1902); Inter-State National Bank *v.* Ringo, 72 Kan. 116, 83 Pac. 119, 115 Am. St. Rep. 176, 3 L. R. A. (N. S.) 1179, n. (1905); Elliott *v.* Peet, 192 Fed. 699 (1912).

[2] Moule *v.* Brown, 4 Bing. N. C. 266; 5 Scott 694.

transfers of debits and credits among themselves in the course of clearing which usage has introduced for the purpose of facilitating the settlement of their mutual accounts in the most convenient manner.

Custom

A question arising as to the custom of the bankers of London in presenting checks for collection, testimony was offered to show a custom of "all London bankers east of St. Paul's" to present for payment upon the same day on which they receive the check. Lord Ellenborough rejected this testimony very contemptuously. "It is not competent to bankers to lay down one rule for the eastward of St. Paul's and another for the westward. They may as well fix upon St. Peter's at Rome." [3]

A custom will not be binding upon a party who has no reason to anticipate that he is to be brought within its operation. For example, where an indorsed check drawn on a bank in Albany was cashed at the Mohawk Bank in Schenectady, and forwarded thence to the bank in Albany for collection, the court said that they must lay out of the question certain special findings of the jury as to the usual course of exchanges between the bank at Schenectady and the bank at Albany, since there was "no pretence that this check was drawn or indorsed with a view to its being negotiated or cashed at the Mohawk Bank, or that there was any usage of trade from which the defendants had reason to suppose it would be collected through that bank." [4]

§ 244. **The Fundamental Rule** underlying all the decisions in regard to time of presentment, forwarding, and so forth, is that reasonable diligence must be observed.[0] Upon the facts of every case, then, must depend the actual length of time that is to be considered reasonable.

Consequently, where the question comes before a jury, a diversity in decisions may be expected; it can only be said that this

[3] Rickford *v.* Ridge, 2 Camp. 537.

[4] Mohawk Bank *v.* Broderick, 13 Wend. (N. Y.) 133.

[0] § 244. A stipulation on the deposit slip that the bank is not to be held liable until the draft is collected does not exempt the bank from liability for its own negligence or that of its agents and is not a waiver of the right of the depositor with regard to presentment, demand and notice of dishonor. Harter *v.* Bank of Brunson, 92 S. C. 440, 75 S. E. 696 (1912); Winchester Milling Co. *v.* Bank of Winchester, 120 Tenn. 225, 111 S. W. 248, 18 L. R. A. (N. S.) 441, n. (1907).

rule of presenting or forwarding on the day following receipt has come to be regarded as satisfactory in the majority of cases where no circumstances interfere to change the rule. In New York it has been held that, if the facts are established beyond dispute, the question whether upon them the presentment was made within reasonable time becomes one of law for the court.[1]

§ 245. **"Crossed" Checks to be paid only as the Crossing directs.** — In England it has been intimated, if not directly decided, that if the payee of the check had stipulated with the drawer that the name of the payee's bankers should be "crossed" on the check, this would have amounted to an agreement by the drawer that the usual course of presentment of the check through bankers might be followed. In such case, if this method involved a delay greater than the law ordinarily allows as between drawer and payee, the former would nevertheless not be acquitted by the failure of his bankers before presentment, though they had continued to pay through the whole period of time which the payee would otherwise have been entitled to for presentation.[1] In this country the system of "crossed checks", strictly so called, is unknown. But of late the germ of a similar custom has begun to manifest itself. Occasionally checks have stamped or written upon them some form of words which is intended to secure their payment exclusively through the clearing-house. No especial form has as yet been generally accepted, and the legal effect of none of those in use has ever been passed upon. It is safe to say, however, that there is no question but that the drawer could embody in his order a direction to his bank to pay only upon presentation of the instrument in the usual course through the clearing-house, and that such a direction would be as valid and as binding upon the bank as a direction to pay only to the order of a particular person. If the check be payable to the order of A. B., it is probable that the privilege of including such instructions in his order, when indorsing over, might be accorded to him; certainly indorsements in this form are very frequent, and no bank would be safe in disregarding them. Supposing the direction to be properly given, the collecting and the paying bank must both respect it, and the English cases above mentioned would be

[1] Mohawk Bank *v.* Broderick, 13 Wend. (N. Y.) 133; Gough *v.* Staats, *id.*, 549.

[1] § 245. Alexander *v.* Burchfield, Car. & M. 75; 3 Scott, N. R. 555; 7 Man. & Gr. 1061.

precedent directly in force. It would amount to an express designation by the drawer, or the payee, of the manner in which alone payment is authorized to be demanded or made.[1a]

Bobbett drew a check on his banker, M., payable to order, crossed it "London and County Bank", and for value sent it to the payee, from whom it was stolen and his indorsement forged. Pinkett, a taker in good faith, ignorant of the forgery, gave it to his country bankers; and their agent, the London and Joint Stock Bank, presented and received payment for it from M., who did not perceive or else disregarded the crossing. P., on hearing that it was paid, gave value for it to a customer. Meanwhile B., at the payee's request, had sent him a second check for the same amount, which was also paid by M., and B.'s account debited with both checks. In an action by B. against P. for the amount of the first, for money had and received, there was a finding that P. and M. and the payee had been guilty of negligence as to the payment. *Held*, that the action was maintainable. M.'s payment to a banker other than the one named in the crossing was improper.[2]

§ 246. **Initiation of Suits and Rights of Action.** — Louisiana holds that the scope of a collecting bank's agency does not extend to the initiation of suits against the debtor upon commercial paper of which payment is refused.[1] Indeed, it is conceivable that the bank might be seriously prejudiced by the institution of such proceedings; for the fact might, under some circumstances, be evidence going to show that the bank had itself adopted the paper, and therefore, whether it were paid or not, owes the amount of it to the original holder.[2]

A note given in charge to a bank for collection, and so indorsed as to place the apparent and technical title in the bank, if not withdrawn after non-payment and protest, may be sued upon by the bank in its own name.[2a] But unless specially so instructed,

[1a] Farmers' Bank *v.* Johnson, 134 Ga. 486, 68 S. E. 85, 137 Am. St. Rep. 242, 30 L. R. A. (N. S.) 697, n. (1910).

[2] Bobbett *v.* Pinkett, 1 L. R. Ex. D. 368 (1876). The negotiability of a check is not affected by 21 & 22 Vict. c. 79, § 2, which enacts that the drawee shall pay to no other person than the banker named in the crossing. Smith *v.* Union Bank of London, L. R. 10 Q. B. 291; affirmed 1 Q. B. D. 31 (1875).

[1] § 246. Crow *v.* Mechanics & Traders' Bank, 12 La. Ann. 692; Ryan *v.* Manufacturers & Merchants' Bank, 9 Daly (N. Y.) 308 (1880).

[2] Wetherill *v.* Bank of Pennsylvania, 1 Miles (Pa.) 399.

[2a] Regina Flour Mill Co. *v.* Holmes, 156 Mass. 11, 30 N. E. 176 (1892), citing Whitten *v.* Hayden, 9 Allen 408; Spofford *v.* Norton, 126 Mass. 533.

it is not the duty of the bank to bring suit under such circumstances.[2b] It would seem, therefore, that its doing so will be purely a gratuitous undertaking upon its part, for which it might perhaps be allowed its actual and necessary disbursements, but certainly nothing more in the way of compensation for its trouble in attending to the proceedings.[3]

But in New York (in which State it will be remembered that it is held that the first bank which receives paper for collection is responsible for the conduct and doings of all subsequent banks and agents through whose hands the paper must pass in the process of collection) it has been ruled that this first bank has such an interest in the paper as to give it a right of action to recover full damages for any injury resulting by reason of any default on the part of any subsequent agent, in a suit against such agent, although no steps have been taken by its own principal to hold itself liable to respond to him for his loss.[4] Whether or not this principle would be sustained in States which do not hold the first bank to that liability to which it is held in New York is perhaps doubtful, though certainly very improbable.

In Minnesota, by statute, an indorsement to " B. for collection " gives no title on which the bank can sue.[5] At common law, the beneficial owner of a bill to bearer, or indorsed in blank, can sue in the name of any real party who will allow his name to be used; and the maker cannot object that the plaintiff is not the real party in interest.[6]

In Kentucky when a bank receives a draft for collection it has no right of action against another bank to which it forwarded the draft for collection, because, by direction of the drawer, it delivered the attached bill of lading before the draft was paid.[7]

[2b] Freeman *v.* Citizens' National Bank, 78 Iowa 150, 42 N. W. 632.

[3] Sterling *v.* Marietta & Susquehanna Trading Co., 11 Serg. & R. (Pa.) 179.

[4] Commercial Bank *v.* Union Bank, 19 Barb. (N. Y.) 391; 1 Kern. (N. Y.) 203.

[5] Rock Co. National Bank *v.* Hollister, 21 Minn. 385.

But an unrestricted indorsement of a check confers on the indorsee the legal title and the right to sue thereon although the check is taken for collection. Citizens' State Bank *v.* Tessman, 121 Minn. 34, 140 N. W. 178, 45 L. R. A. (N. S.) 606 (1913).

[6] Morton *v.* Rogers, 14 Wend. (N. Y.) 575.

[7] Commercial National Bank *v.* First National Bank, 158 Ky. 392, 165 S. W. 398 (1914).

§ 247. **Only Good Money to be received.** — Except by agreement or usage, a bank has no right to take anything but money [0] in payment of paper it holds for collection.[a] If it takes a check, it is agent of the drawer in collecting the check, and not until the money is obtained has it fulfilled its duty as agent of the holder of paper.[1] So that although it has had such check certified, and has credited the amount to the owner of the paper it is agent to collect, yet if it becomes insolvent before actually receiving the money on such check, the owner can claim, in preference to the general creditors; proceeds received subsequent to insolvency being held in trust.[2]

Mode of Dealing

(*a*) Where E. had for two years frequently sent paper to A. for collection, and nearly always received in return, not money, but drafts, drawn by the merchant from whom the collections were made, E. was held to be prevented, by this long course of

[0] § 247. When a bank receives in payment a check by the drawee upon funds in the bank to his credit, and the bank charges the amount of the check to the drawee it is equivalent to the reception of money. Peters Shoe Co. *v.* Murray, 31 Tex. Civ. App. 259, 71 S. W. 977 (1903).

[a] The bank has no implied authority to accept only part payment. Curkeet *v.* Steinhoff, 130 Wis. 146, 109 N. W. 975 (1906). But if the part payment is received and retained by the owner of the note it amounts to a ratification and a complete discharge of liability. Southwest National Bank *v.* Justice, 157 N. C. 373, 72 S. E. 1016 (1911).

If the customer pays what the bank, at his request, has informed him was due the bank cannot subsequently recover an attorney's fee especially when he had no knowledge that the note was in the hands of an attorney or that he had rendered any service in the matter. Security State Bank *v.* Fussell, 36 Okla. 527, 129 Pac. 746 (1913).

[1] Ward *v.* Smith, 7 Wall. 447, 19 L. ed. 207; Farmers' Bank and Trust Co. *v.* Newland, 97 Ky. 472, 31 S. W. 38 (1895); Bank *v.* Cummings, 89 Tenn. 620, 18 S. W. 115 (1890); Morris *v.* Eufaula National Bank, 106 Ala. 388, 18 So. 11 (1894); Donogh *v.* Gillespie, 21 Ont. App. 292; Hazlett *v.* Commercial National Bank, 132 Pa. St. 118, 19 Atl. 55; Fifth National Bank *v.* Ashworth, 123 Pa. St. 212, 16 Atl. 596; Tootle *v.* Cook, 4 Colo. App. 111, 35 Pac. 193; Bank *v.* Union Trust Co., 149 Ill. 343, 367 N. E. 1029; Bradley Lumber Co. *v.* Bradley County Bank, 206 Fed. 41 (1913); City National Bank *v.* Cooper, 91 S. C. 91, 74 S. E. 366 (1911); Gowling *v.* American Express Co., 102 Mo. App. 366, 76 S. W. 712 (1903); Bank of Indian Territory *v.* First National Bank, 109 Mo. App. 665, 83 S. W. 537 (1904); Landa *v.* Traders' Bank, 118 Mo. App. 356, 94 S. W. 770 (1906); Winchester Milling Co. *v.* Bank of Winchester, 120 Tenn. 225, 111 S. W. 248, 18 L. R. A. (N. S.) 441, n. (1907). See next note.

[2] Levi *v.* National Bank, 5 Dill. 104; German American Bank *v.* Third National Bank, 18 Alb. L. J. 252.

dealing, from recovering from A. on account of a draft that was dishonored.[3]

Substituted Note

(*b*) If a bank takes a new note for the one it is engaged to collect, and then becomes insolvent, this substituted note can be recovered by the owner of the first, but the receiver cannot be compelled to pay the amount of the first note.[4]

Preserving the Liability of Prior Parties when a Check is Taken in Payment

(*c*) When the holder of negotiable paper takes a check in payment of it, he should take care to present the check with such diligence, that, if it is not paid, he may return it to the drawer and reclaim the bill or note in time to make a proper demand and protest, so as to preserve the liability of the drawer and indorsers. For example, in case of a foreign bill, he would have to present the check the same day, for a protest on the day following would not be good. In case of an ordinary draft on demand, he must present and protest before the close of the day following his receipt of the bill, so that he may preserve the liability of the prior parties by presenting the check he took in payment upon the same day if it was taken the day following his receipt of the draft, or upon the day succeeding the taking of it in payment if this was upon the very day of receiving the draft.[5]

A bank or other agency may in the same way preserve the liability of former parties when a check is taken in payment of paper it holds for collection; but it does not follow that it will free itself from all responsibility by such preservation of liability, for, the taking of the check in payment being in excess of authority, any loss that results will have to be borne by the agent,[6] as if a

[3] New York Daily Register, Jan. 7, 1885.

If the draft is received in accordance with the usual custom of banks, as conditional payment there is no liability. Hilsinger *v.* Trickett, 86 Ohio St. 286, 99 N. E. 305, 1913D Ann. Cas. 421, n. And in Bank of Commerce *v.* Miller, 105 Ill. App. 224 (1902) the court said that the bank did not act improperly in taking a check for the draft instead of money.

[4] National Bank *v.* Ellicott, 31 Kan. 173, 1 Pac. 593.

[5] Turner *v.* Bank of Fox Lake, 3 Keyes (N. Y.) 425; First National Bank *v.* Fourth National Bank, 77 N. Y. 320, 89 N. Y. 412.

[6] Burkhalter *v.* Second National Bank, 42 N. Y. 538; Smith *v.* Miller, 43 N. Y. 171.

check thus taken would have been paid if presented the same day, but is dishonored the next, and although the liability of the drawer of the *draft* is preserved, yet is worthless because of his insolvency, the bank is liable to the holder. It is the bank's duty to receive only money; if it takes a check, and by delay in presenting it loss occurs, it is liable. If the check was worthless when it was given, or became worthless before it could be presented by the exercise of reasonable diligence, and the bank has so acted as to preserve the liability of former parties, no loss has occurred by negligence in taking or presenting the check.[6] But if the check would have been paid if presented without unreasonable delay, yet afterward is dishonored, the loss is clearly the result of negligence.

It is clearly held in New York[7] and Alabama[7a] that, if a bank takes a check in payment of paper it holds for collection, it must present the check the same day, if it is possible by reasonable diligence; and if it fails to do so, and the check would have been good on that day, but is bad on the next, the bank is liable.

A bank holding a check for collection, and having it certified instead of demanding payment, becomes liable to the owner for the amount of the check with interest from the date of certification.[8]

Ratification

Where the principal takes the check from the collecting agent, who has received it instead of money, it is a ratification of the agent's deviation,[9] unless it is done in ignorance of some material fact affecting the matter, as if the drawer of the check had failed before the principal received the check.[10]

Where the payee of a check, though never having indorsed the same for collection, subsequently accepts part of the proceeds of an unauthorized collection and a promissory note in settlement of her claim, with full knowledge of all the material facts, the bank through which the collection is negotiated is not liable.[10a]

[7] First National Bank of Meadville *v.* Fourth National Bank of New York, 16 Hun (N. Y.) 332; citing Smith *v.* Miller, 43 N. Y. 171; s. c. 52 N. Y. 545.

[7a] Morris *v.* Eufaula National Bank, 106 Ala. 388, 18 So. 11 (1894).

[8] Essex Co. National Bank *v.* Bank of Montreal, 7 Biss. 193.

[9] Rathbun *v.* Citizens' Steamboat Co., 76 N. Y. 376.

[10] Walker *v.* Walker, 5 Heisk (Tenn.) 425.

[10a] Hughes *v.* The Neal Loan and Banking Co., 97 Ga. 383, 23 S. E. 823 (1895).

Payment in Depreciated Currency

(*d*) When a bank is employed to make a collection, it has no authority to take payment in any description of depreciated currency, even though the same may constitute the principal currency in which the ordinary transactions of business are conducted at the place. If it accepts such depreciated currency, it is nevertheless liable to pay the full face amount to its principal in good money. The only description of money which the bank is justified in receiving is either that which is legal tender, or bank bills which are actually redeemed on presentment at the counter of the bank issuing them for their full face value in legal tender.[11] But if any especial circumstances should exempt a bank from the operation of this rule, and should justify it in receiving current funds, though depreciated, then, if the bank returns these specific and identical funds actually received by it to the principal, it is thereby acquitted. If, however, it gives the principal credit for them generally on account, then any subsequent depreciation in them which may take place before the bank makes actual payment to the principal will be the loss of the bank. Its duty is to account to the principal, in such a case, for the full *real* value of the funds received by it for the collection as that value was at the date of the collection.[12]

§ 248. **Disposal of Proceeds.** — After the collection has been made, the bank becomes a simple contract debtor for the amount, less the commission, if any has been charged.[0]

If the party for whom the collection is made is a regular depositor, the sum will be properly placed to his credit upon his general deposit account,[1] unless a peculiar usage or special instructions

[11] Ward *v.* Smith, 7 Wall. 447, 19 L. ed. 207.

[12] Marine Bank *v.* Fulton Bank, 2 Wall. 252, 17 L. ed. 785.

[0] § 248. Security Savings etc. Co. *v.* King, 69 Or. 228, 138 Pac. 465 (1914); Hilburn *v.* Mercantile National Bank, 39 Colo. 189, 89 Pac. 45 (1907).

The custom of banks is to mingle collection money with their general funds and to send their own checks in remittance, and banks and others sending paper for collection are presumed to know of the custom, and, in the absence of special instructions to the contrary, intend to abide by it. Young *v.* Teutonia Bank etc. Co., 134 La. 879, 64 So. 806 (1914).

In the absence of instructions a forwarding bank becomes the ordinary creditor of a collecting bank and has no right to a preference upon insolvency. Young *v.* Teutonia Bank etc. Co., 135 La. 66, 64 So. 984 (1914).

[1] Marine Bank *v.* Rushmore, 28 Ill. 463; Akin *v.* Jones, 93 Tenn. 360, 27 S. W. 669 (1894), citing Howard & Co. *v.* Walker, 8 Pickle 456; First

demand some different course of dealing.[1a] If the party has no deposit account, the bank simply owes him the amount on demand.[2] But, if it chooses, the bank may credit him with it as if it were an

National Bank *v.* Wilmington, 77 Fed. 401; Commercial Bank *v.* Armstrong, 148 U. S. 50, 37 L. ed. 363, 13 Sup. Ct. 533 (1893); Pennington *v.* Third National Bank, 114 Va. 674, 77 S. E. 455, 43 L. R. A. (N. S.) 781, n. (1913).

When a check is drawn by K. to the order of the cashier of a private bank and delivered to C. for deposit in the bank for collection, the bank has no right to credit the proceeds of the check to C. in the absence of indebtedness to it by C., and permit him to draw against it, but it is liable to K. for the proceeds. Kuder *v.* Greene, 72 Ark. 504, 82 S. W. 836 (1904).

When a bank makes collections after it is garnisheed, the money in the hands of the bank is tangible property subject to attachment and does not constitute a mere debt due the sender of the draft. Nashville Produce Co. *v.* Sewell, 121 Ga. 278, 48 S. E. 945 (1904).

The fact that the check was made payable to X. as guardian and by X. regularly indorsed in blank is not sufficient to arouse suspicion that the proceeds belong to the ward. Hood *v.* Kensington National Bank, 230 Pa. St. 508, 79 Atl. 714 (1911).

If the customer had no title to the check the bank is liable at common law to account to the owner of the check for the proceeds thereof; but under section 82 of the Bills of Exchange Act, 1882, the banker has a protection even though he credits the customer with the amount of the check before it is cleared. Akrokerri Mines *v.* Economic Bank (1904), 2 K. B. 465; Capital and Counties Bank *v.* Gordon, 1903 A. C. 240; affirming (1902) 1 K. B. 242.

If, upon the delivery of the draft for collection, there was an agreement between its payees and their creditor that the amount due the creditor should be credited to his account it amounts to an equitable assignment, and the title to the money upon its collection passes to the creditor. Zilke *v.* Woodley, 36 Wash. 84, 78 Pac. 299 (1904).

[1a] Sherwood *v.* Savings Bank, 103 Mich. 109, 61 N. W. 352; Wallace *v.* Stone, 65 N. W. 113 (1895); citing *In re* Johnson, 103 Mich. 109, 61 N. W. 352.

[2] Tinkham *v.* Heyworth, 31 Ill. 519; Planters' Bank *v.* Union Bank, 16 Wall. 483, 21 L. ed. 473; Duncan *v.* Magette, 25 Tex. 245; Peters Shoe Co. *v.* Murray, 31 Tex. Civ. App. 259, 71 S. W. 977 (1903); Hilsinger *v.* Trickett, 86 Ohio St. 286, 99 N. E. 305 (1912).

One who sends a note to a bank for collection, the sum of which when collected is not to be placed to one's credit, is not a depositor, and is not entitled to a preference under section 215 of the constitution of Alabama upon the insolvency of the bank. Nixon State Bank *v.* First State Bank, 180 Ala. 291, 60 So. 868 (1913).

When a bank to which a draft has been sent for collection receives payment of the same without any restrictions it receives it as agent for the one who sent it, and the bank has only one duty to perform, viz. to remit the money to him for whom it had made the collection as soon as the money is paid to it. And if garnishment is served upon it before the money is forwarded it must show, in order to escape liability, that the garnishment was served before it had opportunity to remit in the ordinary course of business. Commerce Trust Co. *v.* Bank of Willow Springs, 161 Mo. App. 431, 143 S. W. 531 (1912).

ordinary payment on deposit, and thus initiate and establish the relation of banker and depositor between itself and him. For though this may operate to place the bank under obligations and duties towards him which would not otherwise have existed, yet these are all for his advantage, and his own right to withdraw the whole sum instantly upon demand is in no respect altered, if he does not wish to ratify the option of the bank and to become an ordinary depositor.[2] In Wisconsin the proceeds are always held in trust.[3]

When a draft is forwarded to a bank for collection and remittance, and collection is made, and the proceeds placed in the vaults of the bank, a draft for the amount less charges for collection being forwarded in payment, such proceeds do not become a trust fund in the hands of the bank.[3a]

Depreciation of Proceeds of Collection

If the bank elects to retain the proceeds as a special deposit, or remit them at once, it will not lose in case of depreciation of the funds. It may discharge itself at any time by payment of the specific funds received, but if it credits the proceeds, it must answer for the amount credited in an equal amount of good money at the time of demand, and so will lose by whatever depreciation of the bank bills constituting the proceeds may have occurred between making the collection and paying the deposit.[4]

[3] McLeod *v.* Evans, 66 Wis. 401, 28 N. W. Rep. 173.

[3a] Bowman *v.* National Bank, 9 Wash. 614, 38 Pac. 211 (1894); Young *v.* Teutonia Bank, 134 La. 879, 64 So. 806 (1914); Gonyer *v.* Williams, 168 Cal. 452, 143 Pac. 736 (1914).

There cannot be a trust fund when the collecting bank's correspondent has collected a note and, by a series of daily balances, rendered it impossible to trace the proceeds of the note with precision. Nixon State Bank *v.* First State Bank, 180 Ala. 291, 60 So. 868 (1913).

When a draft or note is sent to a bank for collection by one who has no deposit there the bank holds the money, when collected, as a trust fund for the depositor who, in case of the bank's insolvency, is entitled to full payment from the money in the bank at the time of its insolvency if there is sufficient to pay all deferred creditors; and, if not, then to his *pro rata* share. Plane Mfg. Co. *v.* Auld, 14 S. D. 512, 86 N. W. 21, 86 Am. St. Rep. 769, n. (1901). But in order to claim a preference it must be clearly shown that the relation of debtor and creditor do not exist. The relation would exist if the collecting bank gave the agent who forwarded the check for collection credit upon its books, even though the remittance was not to be made until some considerable time after collection. McCormick Harvesting Mach. Co. *v.* Yankton Sav. Bank, 15 S. D. 196, 87 N. W. 974 (1901).

[4] Marine Bank *v.* Fulton Bank, 2 Wall. 252, 17 L. ed. 785; Phœnix Bank *v.* Risley, 111 U. S. 125, 28 L. ed. 374, 4 Sup. Ct. 322.

Insolvency Revokes Power to Credit Proceeds

(*a*) After a bank has suspended, it ought not to receive payments upon business paper previously deposited with it for collection; or at least not in such a manner that the money so received by it will pass into its general assets, and the owner of the paper will be placed in the position of one of its creditors, entitled only to take his dividend. The subsequent discharge of the bank, in bankruptcy or insolvency, will not, it is said, bar the right of the owner of such paper to recover in full from the bank the amount received by it.[5] Proceeds received after the bank becomes insolvent are held in trust, and may be recovered in full.[6]

[5] Jockusch *v.* Towsey, 51 Tex. 129.

[6] Havens's Petition, 8 Bened. 309; Levi *v.* National Bank of Missouri, 5 Dill. 104; First National Bank *v.* First National Bank of Richmond, 76 Ind. 561 (1881); Peters Shoe Co. *v.* Murray, 31 Tex. Civ. App. 259, 71 S. W. 977 (1903); Pennington *v.* Third National Bank, 114 Va. 674, 77 S. E. 455 (1913). And it is immaterial that remittance was made as directed by a draft, but which was not paid, or that the funds were mingled with the funds of the bank. Western German Bank *v.* Norwell, 134 Fed. 724 (1905). But no interest on such proceeds may be recovered. Butler *v.* Western German Bank, 159 Fed. 116 (1908).

But see Young *v.* Teutonia Bank etc. Co., 134 La. 879, 64 So. 806 (1914); Hutchinson *v.* National Bank, 145 Ala. 196, 41 So. 143 (1906). And see Goshorn *v.* Murray, 197 Fed. 407 (1912), when there is no knowledge of the insolvency.

If collection is made only a few minutes before a bank closes its doors it holds such proceeds in trust even though a draft is at once drawn therefor and forwarded. Brown *v.* Sheldon State Bank, 139 Iowa 83, 117 N. W. 289 (1908).

If a check is received after a bank has closed its doors it may be recovered from the receiver of the bank. Pulmos County Bank *v.* Bank of Rideout, 165 Cal. 126, 131 Pac. 360, 47 L. R. A. (N. S.) 552, n. (1913).

When the check is signed in blank by the depositor the title is transferred to the bank and the proceeds thereof, in the absence of knowledge of insolvency at the time of deposit, does not become a trust fund. Gonyer *v.* Williams, 168 Cal. 452, 143 Pac. 736 (1914).

When a bank receives a check with instructions "to collect and remit", the proceeds, when collected, are a trust fund and may be recovered from the receiver of the collecting bank. Holder *v.* Western German Bank, 132 Fed. 187 (1904); *id.*, 136 Fed. 90 (1905).

In the absence of fraud on the part of the officers of the bank while the bank was a going concern, it had a right as to creditors to make collections and mingle the proceeds with its general assets, and when so mingled the trust relationship ceased and the obligation to pay or remit arose. But, of course, a different rule prevails after a bank has suspended business and closed it doors. Corporation Commission *v.* Merchants' etc. Bank, 137 N. C. 697, 50 S. E. 308 (1905).

It must be shown that the proceeds in some form went into the assets

Collection by a bank of a debt sent to it for collection in a check upon itself, is equivalent to collection in money even if the bank failed the same day.[6a]

When a bank on the day of its failure credits the owner with the amount of a draft then unmatured and uncollected, it holds the entire amount subsequently collected on the draft in trust as agent of the owner.[6b]

But if the proceeds are collected and credited before insolvency, the owner cannot recover in preference to the other creditors.[7]

And even though a check has been sent for the amount, it will not avail to secure the owner in those States which refuse to recognize a check as an assignment.[8]

And if the proceeds have come to the possession of a *bona fide* holder for value, they cannot be recovered, as where the E. Bank received in good faith and in payment of C.'s debt to it, the proceeds of paper intrusted to C. for collection.[9]

Proceeds of Forged and Raised Paper

(*b*) If a negotiable instrument having a forged indorsement comes to the hands of a bank and is collected by it, the proceeds are held for the rightful owners of the paper, and may be recovered by them, although the bank gave value for the paper, or has paid

of the bank. White *v.* Commercial etc. Bank, 60 S. C. 122, 38 S. E. 453 (1900).

See American Can. Co. *v.* Williams, 176 Fed. 816 (1908); *id.*, 178 Fed. 420 (1910), as to the amount of recovery when the proceeds have been intermingled with other money.

[6a] Sayles *v.* Cox, 95 Tenn. 583, 32 S. W. 626 (1895); citing Howard & Co. *v.* Walker, 8 Pickle 452; Peters Shoe Co. *v.* Murray, 31 Tex. Civ. App. 259, 71 S. W. 977 (1903); Pollak Bros. *v.* Niall-Herin Co., 137 Ga. 23, 72 S. E. 415 (1911); Corporation Commission *v.* Merchants' etc. Bank, 137 N. C. 697, 50 S. E. 308 (1905); Schafer *v.* Olson, 24 N. D. 542, 139 N. W. 983, 43 L. R. A. (N. S.) 762 (1913).

[6b] Jones *v.* Killveth, 49 Ohio St. 401, 31 N. E. 346 (1892).

[7] Bank *v.* Russell, 2 Dill. 215; People *v.* City Bank, 93 N. Y. 582; Hallan *v.* Tillinghast, 19 Wash. 20, 52 Pac. 329 (1898); Billingsley *v.* Pollock, 69 Miss. 761, 13 So. 828 (1892); Sayles *v.* Cox, 95 Tenn. 580, 32 S. W. 626 (1895); citing Akin *v.* Jones, 93 Tenn. 352, 27 S. W. 669; Goshorn *v.* Murray, 210 Fed. 880 (1914); Peters Shoe Co. *v.* Murray, 31 Tex. Civ. App. 259, 71 S. W. 977 (1903); American National Bank *v.* Owensboro Sav. Bank, 146 Ky. 194, 142 S. W. 239, 38 L. R. A. (N. S.) 146, n. (1912).

[8] People *v.* Merchants & Mechanics' Bank, 78 N. Y. 269; Gonyer *v.* Williams, 168 Cal. 452, 143 Pac. 736 (1914).

[9] Charlotte Iron Works *v.* American Exchange National Bank, 34 Hun (N. Y.) 26.

over the proceeds to the party depositing the instrument for collection.[10]

When a correspondent bank presents a raised draft as agent and the drawee pays it by mistake, the latter cannot recover the money from the collecting bank which acted in good faith, without notice, and has paid over the money to its principal before knowing of the mistake.[11]

Where A. purchases a draft drawn on the B. Bank, and subsequently a person representing himself to be A. presents the draft to the C. Bank and requests its collection, the draft having been raised, the C. Bank in directing the collection of the draft for its account assumes the character of principal, so far as the B. Bank is concerned. As the B. Bank makes payment of the draft to the C. Bank as owner thereof, and, being guilty of no negligence, it can recover the money.[12]

When a correspondent bank receives the proceeds of a check sent to it for collection and on the same day pays them back on being told that the check was a fraudulent one, the collector bank is liable for the payment of the proceeds to the transmitting bank and cannot set up as a defense that the cashier of the transmitting bank had knowledge of the fraudulent character of the check.[13]

§ 249. **When the First Bank becomes the Customer's Debtor.** — The theory that the banks and agents subsequent to the first bank are independently direct agents of the holder of the paper, and immediately liable to him, is obviously inconsistent with holding that the receipt of the sum due by any subsequent bank is in law the receipt by the first bank, and at once renders the first bank answerable for the amount. Yet any feature in the dealing of the first bank with any of the parties, which manifests an understanding or intention on the part of that bank to adopt the receipt of the subsequent agent as being its own receipt, will be seized upon by the courts as a ground for holding it directly answerable to the depositor of the paper. In the case of Mackersy *v.*

[10] Boyce *v.* Brockway, 31 N. Y. 490; Talbot *v.* Rochester, 1 Hill (N. Y.) 295; Johnson *v.* First National Bank, 6 Hun (N. Y.) 124; Crandall *v.* Schroeppel, 1 Hun (N. Y.) 557; Meyer *v.* Rosenheim, 115 Ky. 409, 73 S. W. 1129 (1903).

[11] National Park Bank *v.* Seaboard Bank, 114 N. Y. 28, 20 N. E. 632.

[12] National Park Bank *v.* Eldred Bank, 90 Hun (N. Y.) 285.

[13] Monongahela National Bank *v.* First National Bank, 226 Pa. St. 270, 75 Atl. 359, 26 L. R. A. (N. S.) 1098, n. (1910).

Ramsays,[1] elsewhere fully stated, there appears to have been a distinct agreement between the parties that the first bank should pay the depositor so soon as it was notified of the payment having been actually made to the correspondent abroad. In Tabor *v.* Perrot[2] there was no such agreement; but the conduct of the first bank in ordering the foreign collecting bank to give it credit for the sum, and in drawing bills in its own behalf against this credit, was regarded as constituting a complete appropriation of the amount to its own use, rendering it directly responsible to the depositor of the paper, from the moment that the credit was given to it in accordance with its order.

Where the bank pays the amount of the paper to the depositor under the belief, arising from the circumstances, that its correspondent has successfully effected the collection, if it should afterward turn out that the collection has not in fact been thus effected, such bank may recover back from the depositor the amount so paid to him, on the ground that it was a payment made under mistake of fact.[2a] So if the payment was made by any bank, other than the collecting bank itself, to its predecessor in the series of agents.[3] In the courts of New York and of the United States the first bank is liable as soon as the money is paid either to it or to its sub-agent.[4]

When a bank receives a check for collection and it is certified by the drawee by mistake and a draft for the amount remitted to the bank by its correspondent, on which payment is stopped and the payee notified before it reaches the bank, the bank is not chargeable to the depositor as the agreement of collection was that it should only be liable when actual funds or solvent credits should come into its possession, which means the real funds inuring from a collection of the check free from embarrassment and convertible into cash.[5]

[1] § 249. 9 Clark & F. (Eng.) 818. See also Landa *v.* Traders' Bank, 118 Mo. App. 356, 94 S. W. 770 (1906).

[2] Gall. 565.

[2a] First National Bank *v.* Behan, 91 Ky. 562, 16 S. W. 368 (1891). The crediting as cash the check left for collection does not make the bank liable if the check is subsequently dishonored. Security Savings Co. *v.* King, 69 Or. 228, 138 Pac. 465 (1914).

[3] Bank of Orleans *v.* Smith, 3 Hill (N. Y.) 560; East Haddam Bank *v.* Scovil, 12 Conn. 303; Mechanics' Bank *v.* Earp, 4 Rawle (Pa.) 384.

[4] Hyde *v.* First National Bank, 7 Biss. 156. See Hoover *v.* Wise, 1 Otto 308; Ayrault *v.* Pacific Bank, 47 N. Y. 570; Smith *v.* National Bank, 191 Fed. 226 (1911); National Revere Bank *v.* National Bank of Republic, 172 N. Y. 102, 64 N. E. 799 (1902).

[5] Security Savings Co. *v.* King, 69 Or. 228, 138 Pac. 465 (1914).

§ 250. **Liabilities of the Various Banks directly to the Owner.** — If commercial paper is deposited in a bank for collection, and is by that bank transmitted to any other bank or agent, or through any series of banks or agents, till it reaches the possession of the last bank or agent, whose duty it becomes actually to make the collection, can the bank or agent actually making the collection be held directly by the owner of the paper to pay the amount, less charges and expenses, to him? If his demand of payment is refused, without sufficient excuse, may he sue the bank or agent? If the paper is transmitted through several banks, is each one of them directly liable to the owner for its prompt and accurate forwarding to the next bank or agent?

Some of the opinions — those only of course which hold that the first bank, or any bank in the series, is not liable for the act of any subsequent bank or agent, but only for the due performance of the especial task allotted to itself — regard each bank, and the notary too, if a notary is employed, not as the sub-agent of its predecessor or of the first bank, but as the direct agent of the owner of the paper, for the purpose of doing the precise act which falls to its share in the chain of proceeding. Thus, if the paper is transmitted through three banks to a fourth, which has to collect, and is by that fourth bank delivered to a notary to be protested, it is not correct, according to the doctrine of these cases, to regard the second, third, and fourth banks, and the notary, as sub-agents of the first bank, neither to regard the notary as the sub-agent of the fourth bank. But each successive party is deemed to be an independent agent directly of the owner of the paper, having for the scope of its agency, in the case of any one of the first three banks, only the transmission to the next; in the case of the fourth bank, the collection, or, in default of payment, the delivery to a proper party for protest; and in the case of the notary, the various acts which go to make up a legal protest.[1] This view makes the owner's right of action exclusive; the first bank having no right to sue any other.[2] But some of the other class of cases, which regard all the subsequent banks and the notary as sub-agents, each of its predecessor and all of the first bank, allow a double right of action against the one through whose default loss accrues; for these cases declare that the defaulting

[1] § 250. Lawrence *v.* Stonington Bank, 6 Conn. 521; Mechanics' Bank *v.* Earp, 4 Rawle (Pa.) 384; Reeves *v.* State Bank, 8 Ohio St. 465.

[2] Farmers' Bank *v.* Owen, 5 Cranch C. C. 504.

agent may be sued directly by the owner of the paper, who is the original principal in the whole series; and at the same time it is a necessity, resulting from the fact of the sub-agency, that suits may also be brought by that first agent who stands to all the subsequent ones in the relation of an immediate principal.[3] It makes no difference that the first bank is regarded as liable for all the sub-agents. This gives the owner a right of action against the first bank, but does not deprive him of the collateral right to sue the defaulting sub-agent directly and primarily if he wishes. He simply has his election whether he will pursue his remedy against the one or the other.[4]

Those cases, however, which hold the New York rule with greatest strictness, and carry it to its fullest consequences, deny the right of the owner to sue the sub-agent,[5] except that where the transmitting bank becomes insolvent before the agent bank receives payment of the note, and the agent bank has not acquired a right to the note or its proceeds as a *bona fide* holder for value, the owner may recover the note, or the proceeds if collected.[5a] (§ 565.)

The mere crediting of the account of the remitting bank by a correspondent who makes the collection does not preclude the owner of the paper from recovering the proceeds from the correspondent,[6] but a continual course of dealing between the collecting

[3] Wilson *v.* Smith, 3 How. 763, 11 L. ed. 820.

[4] Bank of Orleans *v.* Smith, 3 Hill (N. Y.) 560, per Nelson, C. J., who takes pains to show that this does not conflict with Allen *v.* Merchants' Bank, 22 Wend. (N. Y.) 215. In New York, in cases where the collecting bank is held liable for the default of a notary employed by it, the measure of damages which the holder of the paper can recover from the bank on the ground of such default of the notary is the amount of the note and interest. If the holder has sued an indorser, and has failed to recover by reason of the default of the notary, he cannot increase the damages by adding the expenses of the suit. For the action against the bank is based upon the implied undertaking of the bank to give the notice, and not upon any false representation that the notice has been duly given. Downer *v.* Madison City Bank, 6 Hill (N. Y.) 648.

[5] Hyde *v.* First National Bank, 7 Biss. 156. See Hoover *v.* Wise, 1 Otto 308, 23 L. ed. 392; Ayrault *v.* Pacific Bank, 47 N. Y. 570; Smith *v.* National Bank, 191 Fed. 226 (1911); Martin *v.* Hibernia Bank, 127 La. 301, 53 So. 572 (1910).

[5a] Bank of Clark Co. *v.* Gilman, 84 Hun (N. Y.) 486.

Where the transmitting bank assigns and ceases business before the collection of the draft the agency is terminated and prevents the collecting bank from applying the proceeds to a draft owed to it by the transmitting bank. Morris *v.* Alabama Carbon Co., 139 Ala. 620, 36 So. 764 (1904).

[6] Branch *v.* United States National Bank, 50 Neb. 479, 70 N. W. 34

bank and its sub-agent may pass title of the proceeds of collection to the sub-agent.[7]

§ 251. **Liability to the Real Party in Interest.** — In case of any default on the part of any bank engaged in conducting the collection, whereby it would ordinarily lay itself open to a suit by the party who deposited the paper for collection, suit may also be brought, instead, by any real party in interest, though his name was not mentioned and the fact of his interest was entirely unknown to the bank at the time of its receiving the paper. The naked fact that such person had a real beneficial interest in having the bank do its duty in the premises, and must therefore be an actual loser in some shape by its failure to do so, gives the right of action.[1]

§ 252. **Causes of Liability.** — If a bank fails to do its duty in the matter of collection with reasonable skill and care,[1] it is liable for the damage resulting[2] to any party interested in the paper, whether his name appears on the paper or not.[3] It will be no

(1897); Commercial National Bank *v.* Hamilton National Bank, 42 Fed. 880.

[7] Franklin County Bank *v.* Beal, 49 Fed. 606; First National Bank *v.* First National Bank, 55 Neb. 303.

The relation between the transmitting bank and collecting bank is that of principal and agent and the direction of the principal to the agent to transmit in New York exchange does not change the relation to debtor and creditor and thus permit the owner of the draft to sue the transmitting bank for the money collected by the agent which became insolvent before remittance. Holder *v.* Western German Bank, 132 Fed. 187 (1904).

[1] § 251. McKinster *v.* Bank of Utica, 9 Wend. (N. Y.) 46; 11 *id.*, 473.

[1] § 252. Fabens *v.* Mercantile Bank, 23 Pick. (Mass.) 330; Bailie *v.* Augusta Savings Bank, 95 Ga. 281, 21 S. E. 717 (1894); Bank of Commerce *v.* Ingram, 33 Okla. 46, 124 Pac. 64 (1912).

[2] McKinster *v.* Bank of Utica, 9 Wend. (N. Y.) 46; 11 *id.*, 473; Hobart National Bank *v.* McMurrough, 24 Okla. 210, 103 Pac. 601 (1909).

[3] The measure of damages will be the amount of actual loss which he has sustained. Bank of Washington *v.* Triplett, 1 Pet. 25, 7 L. ed. 37; McKinster *v.* Bank of Utica, 9 Wend. (N. Y.) 46; Tyson *v.* State Bank, 6 Blackf. (Ind.) 225; St. Louis Carbonating Co. *v.* Lookeba State Bank, 35 Okla. 434, 130 Pac. 280 (1913); Hendrix *v.* Jefferson County Sav. Bank, 153 Ala. 636, 45 So. 136, 14 L. R. A. (N. S.) 686 (1907); Jefferson County Sav. Bank *v.* Hendrix, 147 Ala. 670, 39 So. 295, 1 L. R. A. (N. S.) 246, n. (1905); Bank of Rocky Mount *v.* Floyd, 142 N. C. 187, 55 S. E. 95 (1906); Bank of Mount Airy *v.* Greensboro Loan etc. Co., 159 N. C. 85, 74 S. E. 747 (1912).

For pleadings, burden of proof, and evidence in suit of a customer against a collecting bank for negligent failure to collect, see Sahlien *v.* Bank, 90 Tenn. 227, 16 S. W. 373 (1890), citing Bruce *v.* Baxter, 7 Lea 477; Collier *v.* Pullian, 13 Lea 114; Morris *v.* Eufaula National Bank, 106 Ala. 387, 18 So. 11 (1894), citing Industrial Trust Title Co. *v.* Weakley,

defence for the bank to assert that it was not accustomed to undertake collections, and that the error arose from its want of familiarity with the ordinary course of proceedings. Having undertaken the business, it is liable for the results of an improper performance of it.[4] It has been already stated that the bank cannot set up want of consideration.[5]

It has been held, also, that where a bank demands and receives payment of a dishonored note from an indorser, and he, seeking in his turn to recover from a prior indorser, fails to do so by reason of a default by the bank in not making a proper demand upon the maker, which insufficiency was unknown to the paying indorser when he made the payment, he shall recover back the amount of his payment from the bank.

Irregular Acceptance

(*a*) If the paper is returned to it by its correspondent as uncollectible it must in its turn promptly send the paper back with this information to the owner.[6] If it is the duty of the bank to procure the acceptance of a draft or bill, it is bound to procure an absolute and outright acceptance, legally binding upon the acceptor, at least so far as concerns the form and circumstance of the act itself of accepting. If it takes any acceptance which is irregular in form, and which therefore fails to hold the party drawn upon, and rests satisfied with this without at once notifying its principal, it will be liable itself to pay the amount of the paper, if otherwise the amount would be lost to the depositor by reason of his inability to hold the proper party as acceptor.[7] If the bank takes the check of the party who is bound to pay the paper, and thereupon surrenders the paper to him, it assumes the responsibility for the check proving good. If it is not paid, the bank is still obliged to pay the amount to the person from whom it received the paper.[8]

103 Ala. 458, 15 So. 854; Fox *v.* Davenport National Bank, 73 Iowa 649, 35 N. W. 688; Oil Well Co. *v.* Exchange National Bank, 131 Pa. St. 101, 18 Atl. 935.

[4] Ivory *v.* Bank of State of Missouri, 36 Mo. 475.

[5] Halls *v.* Bank of the State, 3 J. S. G. Rich. (S. C.) 366.

[6] Van Wart *v.* Woolley, 3 Barn. & Cres. 439; Wingate *v.* Mechanics' Bank, 10 Barr (Pa.) 104; McKinster *v.* Bank of Utica, 9 Wend. (N. Y.) 46; 11 *id.*, 473.

[7] Walker *v.* Bank of State of New York, 9 N. Y. 582.

[8] Commercial Bank *v.* Union Bank, 1 Kern. (N. Y.) 203; Kirkham *v.* Bank of America, 26 App. Div. (Hun, N. Y.) 110 (1898).

In Citizens' Bank *v.* Houston [8a] it was held that when a bank which receives from the payee, for collection, a check upon another bank, which check is duly protested and notice of dishonor given, subsequently surrenders said check to drawer and accepts in lieu thereof a check on another bank, with protest fees added, which latter check is also protested, the collecting bank does not thereby become liable to the payee, he having suffered no damage from the act, which was in good faith.

(*b*) But if the bank can show that it has conducted itself in the transaction in strict accordance with the customary and established mode of transacting such business, it seems that this might suffice to acquit it of all responsibility for any mishap.[8b] For it has been held in England that a banker who gave up bills indorsed to him for collection, upon receiving the acceptor's check, which was subsequently dishonored, could not be charged with negligence because the transaction was not an unusual one.[9] It may be doubted whether it would free a banker from liability if he should simply show a frequent habit of parting with paper upon receiving the check of the debtor; or whether he would not have to go further, and show positively that it was *understood* in all such transactions that the banker discharged his full duty to his customer by so doing. Otherwise, the usage might amount only to a usage of bankers to assume a liability to their customers in such cases.

If a bank fails to use due diligence in presenting paper for acceptance, it is liable.[10] And notice of dishonor must be duly given, even though the presentment for acceptance which resulted in the dishonor was not legally requisite; for example, the holder of a draft payable at a future day is not required to present it for acceptance, but if it is presented, notice of the dishonor must be promptly given to the drawer or indorser, or he will be discharged.[11] See § 258, Duty to present.

Failure to Protest. Violation of Instructions

(*c*) Where a bank fails to protest a draft taken in part payment of paper left for collection, it is liable for the damage consequent

[8a] Citizens' Bank *v.* Houston, 98 Ky. 141, 32 S. W. 397 (1895).
[8b] Davis *v.* First National Bank, 118 Cal. 600, 50 Pac. 666 (1897).
[9] Russell *v.* Hankey, 6 T. R. 12.
[10] Allen *v.* Suydam, 20 Wend. (N. Y.) 321; Exchange National Bank *v.* Third National Bank, 112 U. S. 290, 28 L. ed. 722, 5 Sup. Ct. 141.
[11] Walker *v.* Bank, 9 N. Y. 582; Bank *v.* Triplett, 1 Pet. 25, 7 L. ed. 37.

on its negligence.[12] So where it omitted to protest a draft improperly accepted in such a way as to bind no one as acceptor.[13] And where the instructions were "to return at once without protest if not paid", and in violation of this order it was kept seven days though not paid, and then returned, the depositor having been in the meantime paid on the representation of the drawee, who was also president of the defendant bank, the latter was held for the damage resulting from its disobedience of instructions.[14] This case does not seem very strong. The loss does not to ordinary vision flow naturally from the failure to obey, but from the negligence of the plaintiff in taking the word of the drawee.

Failure to Inquire

(*d*) A bank mailed paper it had received for collection to the drawee; it miscarried, and the drawee failed nineteen days after. For twenty-eight days after sending the paper the bank made no inquiry about it, and gave the depositor no notice concerning it, till two days more had elapsed. The bank was held liable for its negligence.[15]

So where a check was forwarded by the depositary on the third, and in the regular course of events it should have received on the fourth word of its arrival but did not, and did not know until the 16th that the check was lost, of which it notified the holder on the 18th, the bank was held liable for its negligence in omitting to inquire in regard to the check, whereby loss occurred,[16] the drawee having funds of the drawer until the 20th.

[12] Capitol State Bank *v.* Lane, 52 Miss. 677. See Louisville Banking Co. *v.* Asher, 112 Ky. 138, 65 S. W. 133, 99 Am. St. Rep. 283 (1901), failure to protest note.

[13] Walker *v.* Bank, 9 N. Y. 582.

[14] Merchants & Manufacturers' National Bank *v.* Stafford National Bank, 44 Conn. 564 (U. S. Dist. Ct.). See St. Louis Carbonating Co. *v.* Lookeba State Bank, 35 Okla. 434, 130 Pac. 280 (1913); Lord *v.* Hingham National Bank, 186 Mass. 161, 71 N. E. 312 (1904).

[15] Trinidad National Bank *v.* Denver National Bank, 4 Dill. 290; Hobart National Bank *v.* McMurrough, 24 Okla. 210, 103 Pac. 601 (1909); Bank of Commerce *v.* Ingram, 33 Okla. 46, 124 Pac. 64 (1912).

In South Carolina where the collecting bank made no inquiry for several months it was liable for the loss even though the deposit slip on which the draft was deposited contained the provision that the bank was not to be held liable until the draft was collected. Harter *v.* Bank of Brunson, 92 S. C. 440, 75 S. E. 696 (1912).

[16] Shipsey *v.* Bowery National Bank, 59 N. Y. 485. See Second National

If notice is actually received in time by an indorser from any source, although the *bank was negligent* and did not send the notice it should, it is not liable for such neglect, for no damage is caused by it.[17]

A bank failing to notify the depositor of a check upon itself of the non-payment of the same, is liable.[18]

Negligent Loss

(*e*) A letter containing a bill for collection slipped through a crack in the cashier's desk at the bank, and remained undiscovered till after maturity. The court said that the bill was not presented in the sense of the law, though physically present at maturity, and the acceptor had no funds; that the loss carried with it the presumption of negligence on the part of the bank, and if it could be explained and rebutted the facts for this purpose were peculiarly within the knowledge of its officers, and it must produce them.[19] The bank was held liable to the holder, who had by the disappearance of the bill lost his remedy against the drawer and indorser. The bank as agent must do all that the owner would be required to do to protect his rights, and is liable to the owner for failure in such duty.[20] But failure to collect a draft or to return it where there is an attachment or legal proceeding against the owner of the draft, *jus tertii*, exonerates a bank from negligence.[21]

A bank which fails to present a certificate of deposit for thirty-six days after its receipt is liable for any loss, and if, in the mean-

Bank *v.* Merchants' National Bank, 111 Ky. 930, 64 S. W. 4, 98 Am. St. Rep. 439, 55 L. R. A. 273 (1901).

[17] Hallowell *v.* Curry, 41 Pa. 322.

[18] Bank of New Hanover *v.* Kenan, 76 N. C. 340.

[19] Chicopee Bank *v.* Philadelphia Bank, 8 Wall. 641, 19 L. ed. 422.

[20] Davey *v.* Jones, 42 N. J. Law 30; Beale *v.* Parrish, 20 N. Y. 407; Paint Co. *v.* National Bank, 4 Utah 353 (1886).

[21] Davis *v.* First National Bank, 118 Cal. 600, 50 Pac. 666 (1897).

If the funds of a draft sent by a bank for collection and remission of proceeds have been attached while in the hands of the collecting bank the latter owes the forwarding bank a greater duty than it owes to its depositor, and is bound to defend the title of the forwarding bank or else unequivocally notify such bank to come in and defend itself; and when the agent is guilty of negligence or bad faith it cannot avail itself of a letter of indemnity given by the forwarding bank in order to obtain the proceeds of the collection. Krafft *v.* Citizens' Bank, 139 App. Div. 645 (1910), 124 N. Y. S. 214.

time, it has paid the certificate it cannot recover the amount so paid, upon its non-acceptance.[22]

Where the owner of money employs C., a banker, to obtain his money on deposit in a bank in Italy and delivers the pass book to C., who delivers it to a defendant with a falsely executed power of attorney authorizing it to draw the money, and the bank advanced the money to C., who converted it to his own use, it is not liable if it acted in accordance with its usual custom.[23]

§ 253. **Liability for Default of a Branch.** — Where a branch bank was negligent in not serving notice of dishonor sent to it by the mother bank, the latter was held.[1]

§ 254. **When the Depositor is in Fault.** — If the rule of the bank is that costs of protest must be deposited along with paper put in the bank for collection, and in consequence of the fact that this is omitted the bank fails to protest and give notice, it is not liable,[1] nor is it responsible for the miscarrying of a note because the depositor failed to give the correct address of the bank where it was to be paid.[2]

Where a depositor of a draft for collection, which is credited to him, knows of the failing condition of the drawee and does not impart his information, the bank is discharged from liability.[3]

§ 255. **Mistakes of Fact.** — If a bank mistakes the date of a note and presents it for collection too soon,[1] or sends notice to the wrong person, though one of the same name as the real indorser but living in a different county,[2] it is liable for the loss resulting.

Where a certificate was deposited for collection and a receipt given which stated that the certificate was due December 18, whereas it was due on demand and the bank collected it at once, the depositor cannot require the bank to pay interest which would have accrued had the paper been held until December 18. There was no agreement that the paper should be held and there was

[22] Bank of Mount Airy *v.* Greensboro Loan etc. Co., 159 N. C. 85, 74 S. E. 747 (1912).

[23] Chiarello *v.* Savoy Trust Co., 144 App. Div. 141 (1910), 125 N. Y. S. 1069.

[1] § 253. Bird *v.* Louisiana State Bank, 93 U. S. 96, 23 L. ed. 818.

[1] § 254. Pendleton *v.* Bank, 1 T. B. Mon. (Ky.) 171.

[2] Chapman *v.* Union Bank, 32 How. Pr. (N. Y.) 95.

[3] Freeholders of Middlesex *v.* State Bank, 32 N. J. Eq. 467.

[1] § 255. Bank of Delaware Co. *v.* Bromhall, 38 Pa. St. 135.

[2] Mount *v.* First National Bank, 37 Iowa 457; Borup *v.* Nininger, 5 Minn. 523.

no negligence or violation of instructions, and interest cannot be claimed.[2a]

Where a bank mistook a note that was really negotiable for a non-negotiable one (because it contained provisions beyond those usually found in notes, saying, "being in part payment for a portable engine, which engine shall be and remain the property of the owner of this note until the amount hereby secured is fully paid"), and did not properly protest and notify, it was held responsible.[3]

A bill of exchange was sent to a bank for collection. The bank thought it was a check, and not entitled to grace, and presented and protested it on the day of maturity. This discharged the indorser, and the bank was held to make good the loss.[4] The indorser in this case had notified the bank that the instrument had grace, which strengthened the case against the bank.

A mere nominal error, not calculated to mislead, or which does not in fact mislead, is not fatal, as where a draft was signed Burton and Sowles, and notice was addressed O. A. Burton, and under it Edward A. Sowles, although not accurate, it was held sufficient.[5]

If the collecting bank has knowledge of the address of a party to be notified, it must impart it to its agent or notary.[6] But it is not required of the owner that he shall send the address of an indorser known to him to the bank, with a note deposited for collection. If the agent and the notary use due diligence, and cannot discover the address, the bank can send the notice to the owner, and he may forward it, and if the agent and notary use proper care and come to the conclusion that a party's address is M., and send notice there, such notice is sufficient, though never received, the real address being N., and the owner plaintiff having knowledge of this fact.[7]

§ 256. **Mistake of Law.** — Generally a mistake of law is no excuse, but when a question has not yet been decided, and there is no uniform practice to guide the bank, it is not responsible for mistaking *what will be the future decision of the law;* it is only the

[2a] Ide *v.* Bank, 73 Iowa 58, 34 N. W. 749.

[3] Mott *v.* Havana National Bank, 22 Hun (N. Y.) 354.

[4] Georgia National Bank *v.* Henderson, 46 Ga. 487.

[5] United States National Bank *v.* Burton, 58 Vt. 426, 3 Atl. 756.

[6] Bartlett *v.* Isbell, 31 Conn. 296; Borup *v.* Nininger, 5 Minn. 552.

[7] Ransom *v.* Mack, 2 Hill (N. Y.) 592; Belden *v.* Lamb, 17 Conn. 441.

law that is established that is presumed to be known. A post note was presented and notice given on the day of maturity; this discharged the indorsers. The question whether a post note shall have grace or not being doubtful, no uniform usage existing and the law not having been established by decision, the bank was not responsible.[1]

§ 257. **A Brief Statement**[1] **of the General Principles of the Law Merchant, regarding, —**

§ 258. **Presentment for Acceptance.**
§ 259. **Presentment for Payment.**
§ 260. **Protest.**
§ 261. **Notice of Dishonor,** and
§§ 262, 263. **Excuses for Failure to Present or Notify.**

§ 258. **Presentment for Acceptance.** — (*a*) What Paper; (*b*) When; (*c*) Where; (*d*) By Whom; (*e*) To Whom; (*f*) How; (*g*) Effect of; and (*h*) Failure, its Excuse and Effect.

(*a*) *What Paper.* — All bills payable at sight or after an uncertain event, as after sight or demand, *must* be presented for acceptance without unreasonable delay, unless they contain a waiver ("acceptance waived"). Bills payable on demand, or a certain time after a fixed date, need no presentment for acceptance; but when payable at a future day it is usual to present for acceptance with diligence, because, if accepted, the acceptor's liability is assured, if not, the holder must protest and notify, and has an immediate right of action against the drawer and indorsers. And if there is an express direction to present given to the payee or holder of a bill payable at a fixed time, or if it is put into the hands of an agent to negotiate, it must be presented for acceptance.

(*b*) *When.* — During business hours, within a reasonable period after the bill is received, taking into account the means of communication, the fluctuations in the rate of exchange, the putting of the bill into circulation (delay of a year might not be negligent if the bill were in circulation), and any other circumstances, as war, sickness, or accident, which in common reason affects the question.

Of course, presentment for acceptance must be previous to the day on which the paper is due, or it is merged in presentment for payment.

Business hours, if the paper is payable at a bank, mean its banking hours; if not at a particular bank, but generally "at bank", the usual banking hours of the place of payment; if at any other "place of busi-

[1] § 256. Mechanics' Bank *v.* Merchants' Bank, 6 Met. (Mass.) 13.

[1] § 257. So far as not verified in the chapters on Collection and Checks, these rules are easily found in the standard books, as Daniel on Negotiable Instruments, Parsons on Bills and Notes, or Sharswood's Byles. The object here is to give in a very condensed form the essence of Presentment, Protest, and Notice, for easy reference and a bird's-eye view of matters a comprehension of which is necessary to an understanding of banking cases.

ness", the hours during which such places are usually open; in other cases, business hours continue till the hours of rest usual in the community.

Presentment is always sufficient if it is properly responded to.

If the drawee of a bill is not at his house or counting-room, the holder may wait a reasonable time for his return; a call next day has been held reasonable.

(*c*) *Where.* — Presentment for acceptance must be made at the dwelling or the place of business of the drawee, without regard to the place of payment, and this although the drawee has removed his domicil from the place to which the bill is addressed.

(*d*) *By Whom.* — The holder or his authorized agent.

(*e*) *To Whom.* — The drawee or his authorized agent.

(*f*) *How.* — The presenter should actually exhibit the bill to the drawee, though the drawer and indorsers may be bound without such formality, if the drawee is able to and does give an intelligent answer as to acceptance of it from knowledge previously acquired.

(*g*) *Effect.* — (1) If accepted, the drawee becomes liable for the amount, the acceptance operates as a legal assignment of the amount of the holder, if the drawing of the bill did not have that effect. (2) If not accepted, the holder must protest and notify the drawer and indorsers, and then may sue them without waiting until the maturity of the paper; and if a State law forbids suit till maturity, the United States courts will not be affected by the statute, the question being one of general commercial law, and well settled besides.

(*h*) *Failure, Excuse for.* — (1) When the drawing of the bill is a fraud on the holder. (2) When the residence of the drawee cannot with reasonable diligence be discovered, the bill may be treated as dishonored.

Effect of unexcused failure to present properly is to destroy the holder's remedy on the bill, and also on the debt for which the bill was received.

§ 259. **Presentment for Payment.** — (*a*) When; (*b*) Where; (*c*) By Whom; (*d*) On Whom; (*e*) How.

(*a*) *When.* — Within business hours, according to the custom of the place where payable. See above. As to the day, —

1st. A bill or note payable at a fixed time must be presented on the day of maturity. One day before or after is of no effect to charge the drawer or indorser.

2d. As to the maker of a note or acceptor of a bill, (1) if payable at a particular place, presentment should be on the day of maturity, for if not, the holder will have to make good any loss to the maker or acceptor resulting from the delay; (2) otherwise, demand of payment at any time during the running of the statute of limitations is sufficient.

3d. Bills payable on demand must be presented during business hours on the next business day following their delivery, if the drawee is in the same place as the payee; if in a different place they must be sent by the regular mail of the day following receipt to some one in the place of the drawee, and the person to whom it is sent has the secular day following the one in which the paper has reached him by due course of mail in which to present it. This is the general rule as to reasonable time in such cases, but circumstances may vary it.

4th. Checks (1) as between drawer and payee must be presented for payment in accordance with the rule given in the last paragraph, or the drawer will be discharged to the extent of the damage caused to him by the delay, but no further. (2) As to an indorser, the indorsement is con-

sidered a new drawing, and the same time rule holds, but with a difference in the effect if presentment is not made within the said time. An indorser is entirely discharged by such failure. (3) As between drawer and any indorsee or holder, the presentment must be made within the same time as it would have to be by the payee himself, and with the same effect in case of failure. That is, the drawer is absolutely responsible only during the day following receipt of the check by the payee, or by his agent, to whom it is duly forwarded as above, and no matter how many times the check may be indorsed or transferred, this time cannot be enlarged.

5th. Note payable on demand is regarded by the best writers as a continuing security, especially if given for a loan or payable "with interest", and the rules of the last two paragraphs do not apply; but it will be a question for the jury on all the facts whether the presentment was reasonable or not. (Sharswood's Byles, 388.) The authorities, however, are in irreconcilable conflict, and the question, when it arises in any particular State, should be examined in the light of the decisions in that State.

6th. Grace. (1) Non-negotiable paper has no grace. (2) Bills payable "at sight" are the subject of great conflict. The weight of authority is in favor of grace; reason is not involved; it is a mere matter of formal law, which may be settled equally well either way, the only thing of importance being to *settle it*. (3) All other bills of exchange and negotiable notes have grace, except those expressly payable without it and those payable on demand or in which no time is named (in the last case the law implies that they are on demand). (4) Three days' grace is the usual rule, but it may be varied by local usage, or by statute, enlarging, diminishing, or entirely cutting it off.

7th. The fundamental rule is that presentment must be made in reasonable time under all the circumstances, and the above are merely cases in which the law has determined what shall be considered reasonable time in those circumstances. See Excuse.

(*b*) *Where.* — (1) If the paper names a place of payment, presentment for payment must be made there. (2) If several places are named, the holder may elect, and a presentment at either is good. (3) When no place of payment is named, the place of dating is *prima facie* the seat of the contract; but the real place of performance, controlling the place of date except as to *bona fide* parties for value without notice, is the place of delivery, as to the State whose law is to govern the contract. As to the particular house or spot at which demand should be made, if under the principles of private international law, the place of performance is in the State where the maker or acceptor has his domicil, and the paper is payable generally, demand should be made at his place of business or residence (whether he is there or not it is good), or upon him personally (demand on the street or in the barn-yard has been held good). So, if between the time a note is made or a bill accepted, and the maturity of the same, the maker or acceptor removes into another State, the holder is not obliged to go out of his State in order to make demand at the new domicil, but may fulfil his duty by making demand at the payor's last residence or place of business in that State. If the removal is to another place in the same State, the holder must follow to that place.

(*c*) *By Whom.* — Any *bona fide* holder, or his agent duly authorized (by parol or writing), may demand payment; for example, a notary.

If the holder is dead, his personal representatives or their authorized agent may present.

(*d*) *On Whom.* — Presentment for payment should be made to the *party who is to pay*, or to his authorized agent. It is his duty to provide some one to attend to his business, and demand on his clerk, or wife, or other person most likely of those present at the place of demand to be his agent for such purpose, is sufficient in his absence. And if no one is found at the place of payment, the paper may be treated as dishonored.

If there are *several joint promisors* not partners, demand should be made upon each.

If the joint promisors are partners, demand on any one is enough, even though the firm is dissolved.

If the payor is dead, demand should be made upon his personal representative, if one has been appointed; if not, then at the proper *place*, and the bill treated as dishonored.

(*e*) *How.* — The bill or note must be in possession of the party making demand, and ready to be delivered, and this fact must be clearly indicated to the maker, drawee, or acceptor (which is best done by actual exhibition of it, which the party who is to pay has a right to demand in order that he may be assured that he is paying to the proper person, and that the paper will be delivered to him on payment). But any circumstance which renders this manner of presentment useless excuses its absence, as if the payor refuse to honor the demand on other grounds.

When a bill or note is payable at a particular place, as a business house or at a bank, it is sufficient demand if the paper is present in the bank at the proper time.

§ 260. **Protest,** or formal steps taken to fix the liability of drawer or indorser, and supply reliable evidence of dishonor. — (*a*) What Paper; (*b*) When; (*c*) Where; (*d*) By Whom; (*e*) How.

(*a*) *What Instruments.* — In England and the United States the general rule is that only in case of *foreign bills* is protest necessary, but in many States statutes provide that inland bills and promissory notes may be protested; and it has been held at common law that there is no good reason for making a distinction between foreign bills and notes payable in another State which have been indorsed.

A check drawn in one State and payable in another is a species of foreign bill, and should be protested to charge *an indorser*, and inland checks may be protested under the statutes above mentioned as inland bills.

(*b*) *When.* — (1) Protest should be made when the instrument above named as requiring it is dishonored by non-acceptance or non-payment. (Absence from residence or place of business, leaving no one to pay, is dishonor in case of presentment to acceptor for payment; but absence when a bill is presented for acceptance is no dishonor, for the drawee may have had no notice of the bill. If a bill has been presented for acceptance and refused, no presentment for payment or protest for non-payment is necessary except in case of acceptance *supra* protest.) (2) The "noting" must be done upon the day of maturity of the paper; but the "extension" or complete certificate of protest may be filled out at any subsequent time. (See "How" below.)

(*c*) *Where.* — For non-acceptance, it should be at the place of presentment for acceptance. For non-payment, it should be at the place of payment.

(*d*) *By Whom.* — It should be made by a notary public if one can be found, otherwise by some respectable person of the place where the paper is dishonored, with proper witnesses, though the latter are probably not necessary.

(*e*) *How.* — (1) The bill or note must be presented for acceptance or payment, as the case may be, *by the notary* (or other person making the protest) *in person* (so that his testimony may not be hearsay). (2) During the very day on which the presentment is made by him, he must "note the protest," *i.e.* make a minute on the bill or in his book of registry, consisting of the date, the refusal, the charges of protest, and his initials. (3) The "extension" or complete certificate of protest may be made at any time from a "noting" properly made on the day of maturity of the paper. (4) The certificate should state the time, place, and manner of presentment, to whom and by whom it was made, and the facts of demand and dishonor. (It is also usual to state the reasons given for refusal, and the name of the party ordering protest; but these are not essentials.) (5) The certificate should be authenticated by the notarial seal; courts take judicial note of this, and such seal is *prima facie* evidence of the authenticity of the certificate. If not under notarial seal, it must be proved that the certificate was properly made, and that it is sufficient without seal in the State where made. (6) The certificate is *prima facie* evidence of the facts stated in it so far as they come within the notary's official duty in making presentment, demand, and protest. See (4). Giving notice is not within this scope.

§ 261. **Notice of Dishonor.** — (*a*) When; (*b*) By Whom; (*c*) To Whom; (*d*) How and What.

(*a*) *When.* — (1) The act to be done by the notifier may be done at once after dishonor, without waiting till the close of business hours on the day of payment. (2) But notice given or sent before dishonor is premature. (3) Personal notice may be given at any time up to the close of the day after dishonor and before the close of business hours, if given at the place of business; or, if at the dwelling, then any time before the usual hours of rest. (4) Notice by mail must be deposited in time to go by some mail of the next *business day* following dishonor, unless there is no mail that day or the only mail is closed before early and convenient business hours of that day (seven o'clock being the probable time), in which cases the letter must be put in the office in time for the next mail after the said day following dishonor. Kent says it is enough to mail the letter on said day following, though not in time to go by any mail of that day; but the weight of authority is against him. See Daniel, § 1040; 1 Parsons N. & B. 508; 3 Kent 106. (5) Each party who receives notice has the period named in (4) to send notice to his predecessors, measuring the period not from dishonor, but from the time of receiving notice himself, with the proviso that notice received on Sunday or other non-business day is considered as received upon the next business day, and need not be opened until then.

(*b*) *By Whom.* — (1) Notice must be given the holder or by some party whose liability has been fixed, or by the agent of such a person. (If the holder notifies the fourth indorser, and he the third, and so on, the notices all enure to the benefit of the holder; and if the holder notifies all the indorsers, and the third pays the holder, such third indorser is substituted to the rights of the holder, and may recover of the second or first indorser, though the third had not sent any notices himself. Such is the best opinion.) (2) A stranger, or a party who has been discharged from all liability on the paper, cannot notify, and ratification will not make his act good. (3) If the holder is dead, his representative should attend to giving notice.

(*c*) *To Whom.* — A. (1) The party primarily liable, the maker of a

note or acceptor of a bill, is not entitled to notice of dishonor; it is his duty to provide for payment anyway. No party to non-negotiable paper has a right to notice. The protection of these rules of mercantile law has been extended as yet only to the favorites of commerce. One who transfers paper by mere delivery, without indorsement, as collateral security, is not entitled to notice, and will not be released from the debt secured, except so far as he can show that he has been damaged by failure to present, etc. (2) The drawer of a bill, and any indorser of a bill or negotiable note, is entitled to notice of dishonor. — B. (3) Notice to the agent of the drawer or indorser authorized to receive it is sufficient. (4) If the party to be notified is a partnership, notice to one partner is sufficient. (5) If bankrupt, notice to either himself or his assignee would probably be good; but it is safest to notify both. (6) If dead, and the notifier knows it, notice should be sent to his "legal representative", and notice to one of several executors or administrators is sufficient; if he has no legal representative, notice sent to the residence of the deceased is sufficient. (7) If dead, and the notifier does not know it, and his ignorance is not the result of negligence, a notice addressed to the deceased is good.

(*d*) *What and How.* — (1) The notice must carry information that certain specified paper is dishonored, and *that the person notified is looked to for payment.* The latter clause explains why it is that mere knowledge of dishonor not communicated by one entitled to call for payment is not notice. Of the two elements of notice such a communication only contains one. (2) Notice may be verbal or written; and although the single statement that a bill is dishonored coming from the proper source is sufficient as the intent to hold the person notified is inferred, or the statement that the person is looked to to pay a bill is sufficient, as carrying the inference that it is dishonored, yet it is better that the notice should be in writing, and contain a clear statement *identifying the paper*, and announcing that it has been presented and dishonored, and that the holder or notifier looks to the person notified to pay said paper. (3) It makes no difference how notice be sent, whether by messenger or mail, if it actually reaches the party in time. (4) A special messenger is always a proper method of sending notice. (5) The mail may be used whenever the party to be notified resides or does business in a different place from that where the notifier resides (but see 6 *y*, below), or where the bill or note is payable; also where the said places are not different, if there is a postal delivery, and the letter is put in the office early enough to go to its destination the same day by the regular carriers. What is the test as to difference of place is a question on which authorities differ, some holding that the post-office is to be used only for transportation, not for deposit, and therefore all who get their mail at the same post-office are deemed to live in the same place; others, among them the United States Supreme Court, say that where the person to be notified has no place of business or residence in town, but lives three or four miles out, the post-office may be used, though the notifier gets his mail at the same office. The letter should be addressed to the proper party at the post-office at or nearest to his place of business or his residence, as the notifier elects, unless the party gets his mail at some other office, and then the address should be to it. Whenever it is proper to use the mail, a notice properly addressed and mailed in proper time fixes the liability, whether it is ever received or not, for the post-office is agent of the addressee. (6) (*x*) When the parties live in the same place, which is also the place of payment or ac-

ceptance, as the case may be, the notice must be personal, verbal, or written; or a written notice must be left at the dwelling (or boarding-house) or place of business of the one to be notified; and if the party is not found at such place, it is sufficient to leave the notice with any one on the premises; if such place is closed, notice is excused. (*y*) It is held by good authority, that, in case the party to be notified resides at the place of payment, personal service must be made, although the notifier resides elsewhere. (See Bowling *v.* Harrison, 6 How. 248; *contra*, Philipe *v.* Harberlee, 45 Ala. 608.) (*z*) If the parties reside in the same place, but the place of acceptance or payment, and therefore of protest, is elsewhere, the mail may be used. These rules make the matter of personal service depend on the identity of the domicil of the party to be notified with the place of acceptance or payment, as the case may be; and this identity is determined as in (5).

§ 262. **What excuses Non-Presentment or Want of Notice.**— (1) Anything which obstructs or suspends commercial communication between the parties, as *war* between the nation of the holder and that of the acceptor, or between the nation of the holder and that of the drawer, will interfere with and excuse notice, or any accident, or epidemic, or revolution, or positive prohibition of intercourse, or great fire, or other obstruction of commerce. Necessity excuses all things; and the holder is only required to use reasonable and ordinary care and diligence, and if it appears that any calamity, as a storm, actually prevented due diligence from making the presentment or giving due notice, the failure is excused *until the obstruction ceases*. So in case of a check, if the drawee bank is restrained from paying out money by order of court, presentment and notice are excused. (2) When there is no person legally liable primarily, as when the acceptor or maker is dead, and no representative appointed, presentment is excused, though some cases say it must even then be made at the residence of the deceased, and notice must be given as if dishonored in all such cases. (3) When due diligence cannot find out the residence or place of business of the party to whom presentment should be made or notice given, the duty is suspended until such time as the necessary facts can be discovered. But when the maker or acceptor cannot be found, the bill is to be treated as dishonored, and notice given to the drawer and indorsers. Notice is excused by innocent ignorance of the address of the one to be notified, not by failure to find the one to whom presentment should be made. (4) When the holder or his agent is prevented by sickness, or by the shortness of time between the transfer of the paper to him and its maturity, presentment and notice are excused, in the former case as to all parties, in the latter as to the immediate transferrer, until such time as reasonable diligence can overcome the difficulty. (5) When the maker or acceptor has absconded, no demand is necessary; but notice must be given. (Massachusetts *contra*, as to demand.) (6) Any express or implied waiver of demand or notice is an excuse, as if the drawer or an indorser agrees to waive notice, or so acts as to induce the holder to believe that he waives it, and so stops himself, it is an excuse as to such drawer or indorser. (7) A promise to pay or acknowledgment of liability by drawer or indorser after maturity, and with knowledge that proper demand and notice have not been given, is a waiver. And a part payment after maturity is such an acknowledgment. Part payment of a check before maturity is a waiver of demand and notice. (8) If the drawer have no reasonable expectation that the bill will be honored, or that he will be able to secure funds to meet it, it is not necessary, as

against him, to present or notify; but as against innocent indorsers the usual formalities are necessary. A declaration by the drawer that the paper will not be honored excuses presentment and notice. So, if the drawer of a check have no funds, or insufficient funds, or withdraws his deposit, or orders the bank not to pay the check, no presentment and notice is necessary as to him, — he can suffer no loss by its absence; but as to an indorser such facts are no excuse, unless he knew of the drawer's fraud, and so participated in it. (9) If any party has received money (or perhaps security, though this is the subject of conflict) to pay the paper from the party who is ordinarily primarily liable, as against him demand and notice are excused altogether; for he is now the one who should pay the bill in the first place.

§ 263. **No Excuse.** — The loss of the paper, or the fact that the drawee or maker is dead or has removed, or that he is insolvent, or that the drawer or indorser has been appointed executor or administrator to the maker or acceptor, or that no damage has actually resulted to the drawer or indorser, will not excuse failure to present and give notice. But in case of a check, the drawer is discharged only so far as actually damaged.

CHAPTER XVII

THE LIABILITY OF A BANK FOR THE NEGLIGENCE OF ITS CORRESPONDENT, OR OF A NOTARY, OR OTHER AGENT IN COLLECTIONS. ALSO OF "COLLECTION AGENCIES"

§§ 265, 266. NOTARY.
Bank not liable for, generally, if it uses due care in selection.
In *some* States it is liable, if it permanently employs him.
In *some* States Bank is not liable for his default in *official duty*.
In others, bank is liable for official default of notary, as well as for negligence in a matter which might have been done by any ordinary agent.

§ 266. Care in selecting notary.

§ 267. COLLECTION AGENCIES.
Hoover *v.* Wise, and other cases.

CORRESPONDENT.
Liability for.

§ 268. Great conflict of opinion. Question stated.

§ 269. Special agreement governs and may render a bank not liable for the acts of its sub-agent.

§ 270. Usage may decide.

§ 271. Bank is everywhere liable if it does not select its agents with due care.
It is not due care to send paper to the drawee for collection.

§ 272. New York holds the first bank responsible,

§ 273. On the ground that the contract covers all the means employed.

§ 274. Massachusetts holds the bank not responsible,

§ 275. On the grounds that usage gives authority to employ sub-agents, which are therefore the agents of the holder, and not of the first bank, and that there is no sufficient consideration for the bank to undertake the risk of its correspondent's negligence.

§ 276. Discussion of the question from the ground up tends to support the New York rule.

§§ 272, 277–280. Cases affirming the liability: England, New York, United States, Arkansas, Ohio, Indiana, Louisiana, Michigan, New Jersey, Minnesota, South Carolina, Utah.

§§ 274, 281–287. Authorities denying the liability: Massachusetts, Connecticut, Kansas, Illinois, Iowa, Maryland, Wisconsin, Missouri, Tennessee, Louisiana, Pennsylvania, Kentucky, Nebraska; C. J. Marshall and Chancellor Walworth.

§ 265. **Liability for Negligence of Notary.** — In Mississippi, the bank is not liable if the paper is given to a notary in time for him to discharge his duties.[1] In those States which do not hold a bank for the negligence of its correspondent, the same reasons would prevail against its liability for a notary's default;[2] unless the bank makes a particular notary its permanent employee, as in a Missouri case, where the bank appointed him to act for it for a year, and took a bond, as from one of its own officers.[3] This is the doctrine also in England, New York, Ohio, Alabama, Indiana, and one United States decision.

Louisiana on the same facts holds the bank not responsible. So Massachusetts, Maryland, Mississippi, Connecticut, Pennsylvania, Georgia, and Iowa hold.[4]

In New York, the bank is liable for the negligence of its notary in giving notice of dishonor, for that is not a duty peculiarly belonging to a notary,[4a] but may be performed by any agent of the bank; but for default in anything pertaining to *his official duty*, as protest, the bank is not liable.[5] This distinction is not recognized in the

[1] § 265. Tiernan *v.* Commercial Bank, 7 How. (Miss.) 648; Agricultural Bank *v.* Commercial Bank, 7 Sm. & M. (Miss.) 592; Bowling *v.* Arthur, 34 Miss. 41.

[2] Warren Bank *v.* Suffolk Bank, 10 Cush. (Mass.) 582; Citizens' Bank *v.* Howell, 8 Md. 530. This view was taken in Smedes *v.* Bank of Utica, 20 Johns. (N. Y.) 372.

[3] Gerhardt *v.* Boatman's Savings Inst., 38 Mo. 60; Van Wart *v.* Woolley, 3 Barn. & C. 439; Allen *v.* Merchants' Bank, 22 Wend. (N. Y.) 215; Reeves *v.* State Bank, 8 Ohio St. 465; Branch Bank *v.* Knox, 1 Ala. 148; Bank of Mobile *v.* Huggins, 3 Ala. 206; American Express Co. *v.* Haire, 21 Ind. 4; Taber *v.* Perrot, 2 Gall. 565.

[4] Baldwin *v.* Bank of Louisiana, 1 La. Ann. 13; Hyde *v.* Planters' Bank, 71 La. 560. See Warren Bank *v.* Suffolk Bank, 10 Cush. (Mass.) 582; Citizens' Bank *v.* Howell, 8 Md. 530; Bowling *v.* Arthur, 34 Miss. 41; East Haddam Bank *v.* Scovil, 12 Conn. 303; Bellemire *v.* Bank of United States, 4 Whart. (Pa.) 105; May *v.* Jones, 88 Ga. 311, 14 S. E. 552 (1891); First National Bank *v.* German Bank, 107 Iowa 543, 78 N. W. 195.

[4a] In Nebraska the giving notice of dishonor is an official duty of the notary. Williams *v.* Parks, 63 Neb. 747, 89 N. W. 395, 56 L. R. A. 759 (1902).

[5] Allen *v.* Merchants' Bank, 22 Wend. (N. Y.) 215; Downer *v.* Madison Co. Bank, 6 Hill (N. Y.) 648; Ayrault *v.* Pacific Bank, 47 N. Y. 574. See Williams *v.* Parks, 63 Neb. 747, 89 N. W. 395, 56 L. R. A. 759 (1902).

cases cited above from Maryland and Louisiana, and probably not in Massachusetts.[6]

In South Carolina [7] and in New Jersey a bank is held responsible for its notary,[8] and in Kansas [9] a sub-agent was held liable for its notary's default, though in that State there is no liability for a correspondent.

In the United States [10] courts and in Ohio,[11] a bank is liable for the negligence of its correspondent, but not for the default of a notary, for he is an independent officer whose duties are prescribed by law, and whom the bank must employ. The bank agrees to collect if possible; and if not, " to hand it to a reputable notary in season. We think this may be said to be the natural import of the act of delivery by the one and taking by the other, especially in a jurisdiction where the notary can only act as an independent officer." " The bankers were no more liable than they would have been for the unskilfulness of a lawyer of reputed ability and learning, to whom they might have handed the notes for collection in the conduct of a suit brought upon them."

In Tennessee, a bank is not responsible for the neglect of its correspondent's notary.[12]

Niccolls, in Illinois, sent to Britton's banking firm at Natchez, Mississippi, for collection, a note dated at Natchez, informing the firm of the maker's residence, but only instructing the firm to cause the note, if not paid on presentment, to be protested, and notice to be sent to the indorser. The firm duly put the note in the hands of a reputable notary at Natchez, who, although knowing that the maker resided on his plantation fifteen miles distant and had no place of business in Natchez, merely inquired for him at the post-office, city hall, and court-house, and, not finding him, protested the notes for non-payment. *Held*, that the banking firm was not liable for the notary's neglect of duty, — the Supreme

[6] See Warren Bank *v.* Suffolk Bank, 10 Cush. (Mass.) 582, and Mass. Pub. Stat. c. 77, § 22.

[7] Thompson *v.* Bank, 3 Hill (S. C.) 77.

[8] So held where notices of protest had an indorsee's name "Darcey", instead of "Davey." Davey *v.* Jones, 42 N. J. Law 28 (1880); Titus *v.* Mechanics' National Bank, 35 N. J. Law (1871); Paterson Bank *v.* Butler, 7 Hal. (N. J.) 268.

[9] Bank *v.* Ober, 31 Kan. 599, 3 Pac. 324.

[10] Britton *v.* Niccolls, 104 U. S. 757, 26 L. ed. 917.

[11] Bank *v.* Butler, 41 Ohio St. 519.

[12] Bank of Louisville *v.* First National Bank of Knoxville, 8 Baxter (Tenn.) 101 (1874).

Court of Mississippi, in Bowling *v.* Arthur, 34 Miss. 41, holding that the notary is the agent of the holder.[13]

§ 266. **A Bank must use Due Care in selecting the Notary.** — Ordinarily, a bank which has to employ a notary public would be authorized to assume that any person bearing the governmental commission of office was a proper person to employ. It has been held that this official character is *prima facie* evidence of satisfactory care in selection.[1]

In fact, it probably amounts to this, that the bank is warranted in putting confidence in a public officer of whom it has no actual knowledge, without making that especial inquiry about him which it would be bound to make if he was simply a private individual bearing no credentials, and unknown to the bank officers. But if a bank knows as matter of fact, or ought to know, that a particular notary is for any reason a man unfit for the business and trust reposed in him, the committal of paper to his hands would be an act of carelessness and negligence in the performance of its duty, for the results of which it could be held to answer. The standard of fitness is not of course uniform and absolute; we cannot pretend to say what it may be in all the various States of the Union, but we have some knowledge of what it is in Mississippi. The court there declared that it was not sufficient proof of a notary's unfitness to show that he was a man of habitually dissipated character; but that it must be shown "*that he was drunk at the time he took the note.*" [2]

The fact that a notary is cashier of and a stockholder in a bank does not disqualify him for protesting a bill held by the bank.[3]

§ 267. **Collection Agency Cases.** — Before considering the question of a bank's liability for its correspondent, we must distinguish that class of cases in which an agency undertakes to collect in distant places, through its own permanent employees located in such places, and who are as truly its servants under its control and in its pay as the officers or regular employees in the principal location. These agencies advertise in this style, "Collections made in all parts of the United States and Canada", and do the business for a compensation whose proportion to the sum collected and work done will base a reasonable inference that the company

[13] Britton *v.* Niccolls, 104 U. S. 757, 26 L. ed. 917 (1881).

[1] § 266. Stacy *v.* Dane County Bank, 12 Wis. 629.

[2] Bowling *v.* Arthur, 34 Miss. 41.

[3] Moreland's Assignee *v.* Citizens' Savings Bank, 97 Ky. 217, 30 S. W. 637 (1895).

undertakes the risk as a matter of contract. In such cases the company has been held for the negligence of its employees or agents in other places, by the courts [1] of Pennsylvania, Alabama, Indiana, and by the United States Supreme Court.

In Hoover *v.* Wise, C. gave certain notes to such an agency (W.) in New York. W. sent them to lawyers in Nebraska, and it was held that the latter were agents of W., not of C. The decision rested mainly on the ground of the Pennsylvania cases quoted in the last note; but although distinguishable easily from the cases on the general question of responsibility for a correspondent, the court referred to some of the cases affirming this liability in New York and Ohio, and then displayed its research by remarking, "There are doubtless cases to be found holding the contrary of these views, but the principle they decide is nevertheless well established," while at that time the fact was that the overwhelming authority of the States, backed by a clear opinion of C. J. Marshall, denied that principle.

The dissent by Justices Miller, Clifford, and Bradley was very strong, showing that, even if the principle of the bank cases cited by the court were admitted, it did not apply to the case at bar; for when a note is given to a bank to collect it is indorsed to the bank, and made payable to it, so that it can sue in its own name; but here the note was not indorsed to W., who therefore had no control of the suit, while C. could exercise full control in regard to the proceedings.

§ 268. **Liability for a Correspondent.** — We must now approach a topic wherein will be encountered a diversity of opinion which is utterly irreconcilable. Positions directly adverse to each other have been assumed with much obstinacy. Beyond this honest discrepancy, a further vexatious complication is introduced by the use in some decisions, delivered by high tribunals, of such dubious language that it is positively impossible to know precisely upon which side to rank them, or even whether they really ought to be ranked upon either side, and should not rather be formed into a group and class by themselves. This confusion grows out of the process of transmission through banks, situated in various different places, of paper which is payable in a town other than that in

[1] § 267. Bradstreet *v.* Everson, 72 Pa. St. 124; Morgan *v.* Tener, 83 Pa. St. 305; Lewis *v.* Peck & Clark, 10 Ala. 142; Pollard *v.* Rowland, 2 Blackf. (Ind.) 22 (1826); Hoover *v.* Wise, 91 U. S. 308, 23 L. ed. 392. See Wilkinson *v.* Griswold, 12 S. & M. (Miss.) 669; Cummins *v.* Heald, 24 Kan. 600.

which the holder resides, and in which the bank of deposit transacts business. The question concerns the duty and liability of the several banks preceding in the chain of transmission the last one which has to effect the actual collection. Thus, if A. living in Portland holds a note payable in New York and deposits it in his bank in Portland for collection, the bank in Portland may be supposed to forward it to its correspondent bank in Boston, which in turn will forward it to its correspondent bank in New York City, where finally the collection is to be made. The question then is, whether or not the Portland bank has so far fulfilled and discharged its duty to A. by the due and sufficient transmission of the paper on its course for collection that it is thereby freed and absolutely relieved from all liability for defaults subsequently occurring in Boston or in New York; or whether, on the other hand, the Boston and New York banks, and any agent employed by the last bank in the business of collection, are all sub-agents of the Portland bank, in such a sense that the law of agency rendering it, as principal, liable to answer for any and all their defaults, will govern in the case.

§ 269. **Special Agreement.** — If there is an express contract upon the matter of the first bank's responsibility, of course the question will be governed by it, and if the character of the contract and the consideration is such as to indicate such an intent, the first bank will be held liable, even in those States where upon the ordinary contract it is not held. For example, in Pennsylvania, if a bank receives a reward for collecting beyond the expense, and mere nominal charge for service in forwarding, and employs a Virginia bank to collect the note, the Pennsylvania bank will be responsible for any negligence of the Virginia bank.[1]

Where a collection is placed in the hands of a bank with authority to employ another bank to collect it, the second bank becomes the sub-agent of the customer of the first, for the reason that the customer authorizes the employment of such agent to make the collection.[2] See § 272 *et seq.*

The exchange which is usually charged by banks for the transmission of money from one place to another is not a sufficient consideration to support an implied undertaking to answer for the

[1] § 269. Mechanics' Bank *v.* Earp, 4 Rawle (Pa.) 384. See Landa *v.* Traders' Bank, 118 Mo. App. 356, 94 S. W. 770 (1906).

[2] Beach *v.* Moser, 46 Pac. 202 (1896).

default of the correspondent selected to make collections for customers according to the course of business of banks.[3]

§ 270. **Usage** may determine the question. If the law has not been already settled by judicial determination, so as to exclude any subsequent evidence of usage to subvert it, the bank may absolve itself from liability for the acts of agents other than itself, or the customer may fix such liability upon the bank, by showing, respectively, that such is the established usage and understood custom in the place where the bank, the extent of whose duty and liability is in question, is situated. But the evidence must show a usage having the strictly legal traits; it must be a real *bona fide* usage, an actual practice, a general understanding, not the mere opinion of either merchants or bankers.[1]

§ 271. **A Bank is everywhere held liable if it is itself negligent in the Selection of its Correspondent.** — See chapter preceding.

When the Bank has used Due Care, and the Matter is not determined by Usage or Special Agreement

§ 272. **The New York Rule** is that the first bank is responsible for the negligence of its correspondent and its agents;[1] they are agents of the first bank (B). There is no privity between them and the holder (C.), and the latter cannot hold them directly except he may sue the correspondent (M.) for money had and received, in case M. had notice of B.'s insolvency before he (M.) received payment on the note, and that no dealings occurred between M. and B. that could constitute M.'s possession of the note a *bona fide* holding for value without notice, and that C. was the owner of the note.[2]

[3] First National Bank *v.* Sprague, 34 Neb. 318, 51 N. W. 846 (1892).

[1] § 270. Allen *v.* Merchants' Bank, 22 Wend. (N. Y.) 215; Warren Bank *v.* Suffolk Bank, 10 Cush. (Mass.) 583; Jackson *v.* Union Bank, 6 Har. & J. (Md.) 146. See Smith *v.* National Bank, 191 Fed. 226 (1911).

[1] § 272. Allen *v.* Merchants' Bank, 22 Wend. (N. Y.) 215; Ayrault *v.* Pacific Bank, 47 N. Y. 570; Indig *v.* Brooklyn City Bank, 16 Hun (N. Y.) 203. See Montgomery Co. Bank *v.* The Albany City Bank, 7 N. Y. 459; Bank of Clarke County *v.* Gilman, 81 Hun (N. Y.) 486; St. Nicholas Bank *v.* State National Bank, 128 N. Y. 26, 27 N. E. 849; National Revere Bank *v.* National Bank of Republic, 172 N. Y. 102, 64 N. E. 799 (1902).

If a bank does not receive the paper for *collection* but only for *transmission* it is not liable for the negligence of its correspondents; but in a chain of banks, the first bank receiving the paper for collection is liable. McBride *v.* Illinois National Bank, 163 App. Div. 417 (1914), 148 N. Y. S. 654.

[2] Wicks *v.* Hatch, 62 N. Y. 535; Wilson *v.* Smith, 3 How. 763, 11 L. ed.

The New York rule is held [3] in England, Arkansas, Ohio, Indiana, Louisiana, South Carolina, Utah, Michigan, New Jersey, Minnesota, and by the United States Supreme Court.

Grounds of Affirming Liability of First Bank

§ 273. Those authorities which hold that the bank first receiving the paper is answerable for the conduct of any and all the subsequent agents, be they banks or notaries, base their decision upon the old and strict principle in the law of agency, that the first agent is liable for the acts of all the sub-agents employed by him. They urge that the bank is employed to perform the task of collection in any manner that it may see fit, trammelled by no restrictions or directions whatsoever as to the persons or corporations whose services it shall employ, if it does not itself wish to attend to the whole transaction. This task is declared to be that which the bank undertakes to do. If it chooses to use the medium of subagencies, it selects those which it prefers, and is free to trust them more or less, and to instruct them as it chooses. They are directly its own agents and employees, and both law and justice demand that it should answer for their conduct to its own principal. New York (and the other decisions affirming the liability are only reflections of New York light) bases its ruling upon the ground that a *contract to do the business* covers all the means employed, and upon the assumption that, when a note is given to a bank to

820; Strong *v.* Stewart, 9 Heisk. (Tenn.) 137; Reeves *v.* State Bank, 8 Ohio St. 465; McBride *v.* Illinois National Bank, 163 App. Div. 417 (1914), 148 N. Y. S. 654.

[3] Van Wart *v.* Woolley, 3 Barn. & C. 439; Mackersy *v.* Ramsays, 9 C. & F. 818; Second National Bank *v.* Bank of Alma, 99 Ark. 386, 138 S. W. 472 (1911); Reeves *v.* State Bank of Ohio, 8 Ohio St. 465; American Express Co. *v.* Haire, 21 Ind. 4; Tyson *v.* State Bank, 6 Blackf. (Ind.) 225; Martin *v.* Hibernia Bank, 127 La. 301, 53 So. 572 (1910); Simpson *v.* Waldby, 63 Mich. 439, 30 N. W. 199; Titus *v.* Mechanics' National Bank, 35 N. J. Law 558; Streissguth *v.* National German-American Bank, 43 Minn. 50, 44 N. W. 497; Fort Dearborn National Bank *v.* Security Bank, 87 Minn. 81, 91 N. W. 257 (1902); Harter *v.* Bank of Brunson, 92 S. C. 440, 74 S. E. 366 (1912); City National Bank *v.* Cooper, 91 S. C. 91, 75 S. E. 696 (1910), citing the rule on both sides, and many cases and holding that this rule is strengthened when the bank gives credit to the depositor for the paper sent in payment of his draft by the collecting bank; California National Bank *v.* Utah National Bank, 190 Fed. 318 (1911); Exchange National Bank *v.* Third National Bank, 112 U. S. 276, 28 L. ed. 722, 5 Sup. Ct. 141; Taber *v.* Perrot, 2 Gall. 565; Hyde *v.* First National Bank, 7 Biss. 156; Kent *v.* Dawson Bank, 13 Blatchf. 237.

collect, it is a contract to do the whole business and not merely to forward, which is assuming the very thing to be proved, and upon no argument except the oft exposed fallacy of "sufficient reason", which runs thus: "There is no reason (known to me) why this should not be so, therefore it is so," — which simply applies to the universe the limitations of the mind of the speaker. (See Mill's System of Logic, p. 464, and compare Senator Verplanck's argument in the leading New York case below.)

§ 274. **The Massachusetts Rule** is,[1] that when the first bank transmits the note with proper instructions to a reputable and proper agent, either in the place where the collection is to be made, or in the place nearest thereto where it has a correspondent or agent whom it deems fit to employ for the purpose of forwarding, it has done its duty, and is not responsible for the negligence of the correspondent or its agents.

This rule is adopted in Connecticut,[2] Kansas,[3] Illinois,[4] Iowa,[5] Maryland,[6] Mississippi,[7] Missouri,[8] Tennessee,[9] Wisconsin,[10] Louisiana,[11] Pennsylvania,[12] Kentucky,[12a] Nebraska,[12b] North

[1] § 274. Fabens *v.* Mercantile Bank, 23 Pick. (Mass.) 330; Dorchester & M. Bank *v.* New England Bank, 1 Cush. (Mass.) 177; see Darling *v.* Stanwood, 14 Allen 504.

[2] Lawrence *v.* Stonington Bank, 6 Conn. 521; East Haddam Bank *v.* Scovil, 12 Conn. 303.

[3] Bank *v.* Ober, 31 Kan. 599, 3 Pac. 324.

[4] Ætna Ins. Co. *v.* Alton City Bank, 25 Ill. 243; Waterloo Milling Co. *v.* Kuenster & Co., 158 Ill. 259, 41 N. E. 906, affirming Waterloo Milling Co. *v.* Kuenster & Co., 58 Ill. App. 61. See § 287.

[5] Guelick *v.* National Bank, 56 Iowa 434, 9 N. W. 328.

[6] Citizens' Bank *v.* Howell, 8 Md. 530; Jackson *v.* Union Bank, 6 Harr. & J. (Md.) 146.

[7] Tiernan *v.* Commercial Bank, 7 How. (Miss.) 648; Agricultural Bank *v.* Commercial Bank, 7 Sm. & M. (Miss.) 592; Bowling *v.* Arthur, 34 Miss. 41.

[8] Daly *v.* Butchers & Drovers' Bank, 56 Mo. 94.

But if there is an agreement to collect for a consideration the first bank is liable for the negligence of its correspondent, even though there is a notice upon the customer's pass book that the bank assumes no responsibility for the negligence of its correspondent. Landa *v.* Traders' Bank, 118 Mo. App. 356, 94 S. W. 770 (1906).

[9] Bank of Louisville *v.* First National Bank, 8 Baxter (Tenn.) 101; Bank *v.* Cummings, 89 Tenn. 618, 18 S. W. 115 (1890); Winchester Milling Co. *v.* Bank of Winchester, 120 Tenn. 225, 111 S. W. 248, 18 L. R. A. (N. S.) 441, n. (1907). See § 287.

[10] Stacy *v.* Dane Co. Bank, 12 Wis. 629.

[11] Hyde *v.* Planters' Bank, 17 La. 560; Baldwin *v.* Bank of Louisiana, 1 La. Ann. 13.

[12] Merchants' Bank *v.* Goodman, 109 Pa. St. 422, 2 Atl. 687; and see

Carolina,[12c] South Dakota,[12d] and in the decision of the United States Supreme Court in the case of the Bank of Washington *v.* Triplett,[13] C. J. Marshall delivering the opinion, and in the strong dissent of Chancellor Walworth in Allen *v.* Merchants' Bank [14] in New York.

Grounds of the Massachusetts Doctrine

§ 275. First, although it is a well-settled rule that an agent is in general liable for the sub-agents employed by him, it is also well settled that there is an exception to the rule whenever there is authority, expressly given, or fairly implied from the usage of trade, or the exigencies of the case, to employ such sub-agent.[1]

"If there exists in relation to the business a known and established usage of substitution, the principal would be held to have expected and authorized such substitution", and "a substitute appointed by an agent, who has this power of substitution, becomes the agent of the original principal, and may bind him by his acts, and is responsible to him as his agent."

Now in the case of collection, the usage to forward to a sub-agent is well established, and the parties must be presumed to contract in reference to it. The customer expects, or ought to expect, that the bank will pursue the ordinary course of business in such matters; this usual course is well known to be simply the transmission to another agent in good repute, and this is all the bank or the customer can be supposed to contemplate as that duty of which the accurate performance is guaranteed by the corporation.

Mechanics' Bank *v.* Earp, 4 Rawle (Pa.) 384, and Bellemire *v.* U. S. Bank, 4 Whart. (Pa.) 105.

[12a] Farmers' Bank and Trust Co. *v.* Newland, 97 Ky. 470, 31 S. W. 38 (1895); Falls City Woolen Mills *v.* Louisville National Bank, 145 Ky. 64, 140 S. W. 66 (1911).

[12b] First National Bank of Pawnee City *v.* Sprague, 34 Neb. 318, 51 N. W. 846 (1892).

[12c] Bank of Rocky Mount *v.* Floyd, 142 N. C. 187, 55 S. E. 95 (1906).

[12d] Fanset *v.* Garden City State Bank, 24 S. D. 248, 123 N. W. 686 (1909).

[13] 1 Pet. 25, 7 L. ed. 37.

[14] 22 Wend. (N. Y.) 215; and see Smedes *v.* Bank of Utica, 20 Johns. (N. Y.) 373.

[1] § 275. Story on Agency, §§ 201–214.

The Consideration Taken will not Warrant the Inference of Intent to Assume the Risk

Ordinarily, when there is any commission paid for collection, it is a very small one; but probably in the great majority of cases the business is wholly gratuitous, and the consideration is only that slight and indirect one which arises from the anticipation of enjoying for a few days the use of the money collected or from the manifestation of a willingness to oblige customers. Such considerations may well be regarded as sufficient for the mere task of transmission; but it is impossible that they should be sufficient to sustain an agreement to be further responsible for the solvency and good conduct and thorough performance of their duties on behalf of all subsequent banks and notaries, or other agents whom it may be necessary to employ. Such an insurance would call for a high premium. It is incredible to suppose that the bank for a very small possible remuneration, much more for a wholly contingent return in any shape, assumes so great a risk.

In cases where the compensation is such as to base an inference that it was intended to cover something more than the mere service rendered, or where there is no clear authority for substitution, the contract to assume the risk may be, with more show of reason, implied by the law.[2]

To this it may be added, that the reasoning of the affirmative cases applies as well to a notary as to a correspondent bank. If the contract to collect is an agreement "*to do the business*", "to employ proper means by whomsoever used", then a bank is responsible for a notary's default; and yet this is denied even in New York, the stronghold of the affirmative, upon the plea that a notary is a public officer whose duties are prescribed by law. This, however, is a mere surface distinction; a bank is also a public institution, and its duties are just as truly fixed by the law, and a bank is no more obliged to select any particular notary than it is to choose a particular bank for its correspondent.

§ 276. **Discussion of the Question of Liability for Correspondent.** — If we try to stand off and take a comprehensive view of this much trodden ground, and endeavor to distinguish the footsteps of justice from those of other things that have the power of leaving

[2] See the agency cases above, and Bank of Kentucky *v.* Adams Express Co., 93 U. S. 174, 23 L. ed. 872; Loomis *v.* Simpson, 13 Iowa 532; Abbott *v.* Smith, 4 Ind. 452; Ellis *v.* Turner, 8 T. R. 531.

their impressions on the sands of time, it will be clear at once, that, so far *as any argument can be based upon the principles of contract,* the negative must receive our approbation.

That parties contract in reference to established usage affecting the subject matter, that the intent of those who make the agreement is to govern, and that this intent is to be collected from their words and acts viewed in the light of the circumstances, are principles too nearly and plainly related to justice herself to allow us to doubt their lineage for a moment.

The reasoning of § 275 seems therefore conclusive, if we confine ourselves to an *a posteriori* view of a transaction of the class we are considering in the light of contract.

(*a*) Turning to the general principles upon which one may be justly held for the defaults of others, aside from any contract to be so responsible, we have to note that the aim of the law is to secure the public good by encouraging and developing such conduct and qualities as experience shows to be *beneficial* to the community, and preventing and exterminating such conduct and qualities as experience and the nature of things show to be *detrimental* to society. Thus, good faith, prudence, foresight, increase of wealth, are invaluable, and the law is one means brought to bear by the social body upon each individual to secure such conduct from him as accords with those qualities and objects, while fraud, imprudence, lack of foresight, and waste of wealth in any individual being detrimental to others, these others in the shape of the State seek through law to repress these qualities in the individual, and to prevent conduct of which they are the sources. The law is only a captain in the great army of forces warring upon human savagery and striving to elevate the race, by repression and elimination of what is evil in it, and development of what is good in it. It is a part of the effort put forth by each individual, and by each combination of individuals, to control all other things and persons to the fulfilment of his or their desires.

In the case of class legislation good and evil are interpreted in reference to the benefit or disadvantage of the ruling class, but in the common law the question is between an individual and the whole mass of the community beside. Now if the evil and the good were found chemically pure, if there were no gold with the dirt, if a man of imprudence had never any beneficial quality mingled with his evil dispositions, the problem would be simple, the blood of society could be purified quickly and easily by exterminat-

ing all individuals exhibiting detrimental qualities; but as this is not the case, as good and evil are mingled in each person, there arises a necessity for that *proportion between repression and evil, or encouragement and good, which men call justice;* for if care is not taken to repress an individual only in proportion to the evil tendency manifested, the repression acts upon his good qualities. And if A., having certain beneficial qualities, receives more encouragement than B., having equally beneficial qualities, the excess really amounts to so much scope and encouragement to A.'s detrimental qualities as well as his good ones.

One method adopted in the common law to secure this equivalence between repression and evil is like one of those chosen by nature in the development of life; viz. to throw the loss arising in any transaction upon the one who has in the course of the actions producing the loss manifested in greater degree such qualities as it is desirable to eliminate.

This is imperfect; for in case both A. and B. have been guilty of detrimental contributory conduct, the loss should be divided, and in some States this is done in cases of negligence, but usually the common law refuses to interfere at all when both parties are substantially in fault, which leaves the loss on the unlucky one, and serves in many cases practically to enable a rascal to profit by his badness, and although it is true the law cannot waste time and money to *benefit another rascal*, still it might very well refuse to allow *either one* to retain the benefit, *i.e.* confiscate it for the public good.

Now apply this test of equivalence to the question of the degree of responsibility to which any individual can be justly held.

If B.'s conduct is in itself neither detrimental nor beneficial, in an appreciable degree, to the community, as, for example, the keeping of dangerous wild animals, he may very properly be held absolutely for all loss that may ensue to C. without C.'s fault, whether B. was careless or not. This is the zero line.

If B.'s conduct is in its very nature detrimental, then in proportion to its tendency to produce evil consequences, and in the proportion that a tendency to subsequent evil action is manifested by such conduct, society should take measures to prevent B. from producing further evil individually, or through the laws of inheritance, and thus results the criminal.

If, in the third place, B.'s conduct is in its nature beneficial, as commercial transactions in general are, but in the course of the

business B. makes some error of judgment, or loss occurs through the neglect or fault of one selected by B. to aid in the matter, it is clear that the law of equivalence or justice will not allow B. to be held responsible for a degree of care and foresight beyond that required of C. in other matters of business alike beneficial in their nature. It is clearly unjust for C. and his class to say to B. and his class, " If you suffer loss from my lack of foresight or judgment, in any case where I have conducted myself as a man of ordinary care and prudence would in the management of his own affairs under the same circumstances, you will have to bear the loss yourself, for you cannot expect me to be superior to the average in my business; but if we suffer loss from your error, or that of any one selected by you, you will have to answer to us absolutely, even though you have been more careful than the most careful of men usually are in their own business of similar nature and danger." A perfect fulfilment of the law of equality would require that, if one is to be held absolutely responsible for the result of one's actions, all should be. If one is to be held only to such care as a man of ordinary prudence and foresight exercises in his own affairs of similar moment and danger, all should be required to come up to the same standard, and no one punished for not going higher.

(*b*) But perfect justice is unattainable; we have to choose between injustices, and it is never safe to conclude that a certain course is not a proper one, and truly the *most just* course, because we are convinced it does not perfectly accord with the law of equality; we must further inquire whether the alternate course does not involve still greater injustice; and in the case before us, the law may very properly say to B., Your business is of such an intricate nature, and extends over so wide a territory, and the sources of our information are so peculiarly within your own grasp, that it is very difficult in any case that may arise to determine the question whether you have exercised due care or not, while in C.'s case it is a much simpler question. Practically, therefore, the only way to be sure of your exercising proper care is to make you responsible anyway, and so give you the strongest motive for care, which rule, although it may work some injustice to you, is like to work less injustice to the whole community than an arrangement by which, owing to the difficulty of proving your negligence, you would often escape the consequences of actual fault; while in C.'s case such a departure from the exact line is not necessary,

for the relative simplicity of the problem in his case makes it easy to apply the standard.

Moreover, litigation is expensive, and it must be one object of the law to waste as little as possible of the wealth of the community in judicial inquiry. Now the degree of care which a prudent man would exercise in your business is by its nature and importance very high, and though strict justice to you would not warrant imposing an absolute responsibility on you, yet as we have to choose between this slight injustice to you of putting the line of your liability a little higher than that of your neighbors, and the greater injustice to the community of exposing them to tedious, inconvenient, and expensive litigation, first here to determine the question of your care and then perhaps in some distant city with which the plaintiff has no connection, we are compelled to select the first course, which, though it puts a pressure upon you beyond the equal line, has the merit of being a pressure in the direction of progress and the development of still greater prudence and foresight (both on your part and on the part of your correspondents, for they can much more surely be held to account by you than by C.), while the other path would lead to the encouragement of fraud and the waste of time and money in intricate inquiry.

(*c*) *Or*, coming again upon contract ground, although looking *back* at a completed transaction, it is impossible to conclude that the parties intended that the bank should assume the risk of losing the amount of the note or bill, yet if we turn and look forward, considering the effect of the decision to be given not as to the justice between the parties in the case giving rise to the litigation, but as to the future of the business, we may well say to the bank, On the whole the best and most convenient arrangement in such matters would be that you should take the responsibility, and make a reasonable charge for your risk; you have intimate relations with these persons selected by you in distant cities, you can much more easily hold them to account, than a private person here; your knowledge of your correspondents is an intricate matter, and the question of your care a difficult one, which to save cost it is well to exclude from the law; therefore, unless you make an express agreement to the contrary, we shall in future consider this to be the law, and you can conduct yourself accordingly. To accomplish our purpose of establishing this as the law, we must decide this case against you for a precedent, although, if we had not the future

in mind, but only decided upon the facts of this case, the judgment would be the other way.

This, we believe, makes pretty clear the sources of the conflict on this question, and while it furnishes a solid basis for the New York rule in reference to the future good of society upon considerations probably felt by the judges in New York and in the United States Supreme Court (though the actual grounds of their decision as expressed by them are not put in any such light as to justify it), the discussion discloses the invincible reasoning of the negative if the eye is turned backward.

The same arguments apply, though with less force, to the case of a notary.

Cases affirming the Liability of a Bank for the Negligence of its Correspondent Bank

§ 277. **England.** — In Van Wart *v.* Woolley,[1] — the original foundation of the affirmance of the liability of the first bank so far as it rests on authority, — G. in America drew a bill on D. in London, and A. sent it to C. in Birmingham on account of purchases made by C. in England for A. in America. C. put it into the hands of B., his bankers in Birmingham, for collection, who forwarded it to L., their correspondent in London. D. refused to accept, and L. failed to protest or give notice of non-acceptance. C. sued B. for the negligence of L. Abbot, C. J., said: "Upon this state of facts, it is evident that the defendants (who cannot be distinguished from and are answerable for their London correspondent) have been guilty of a neglect of the duty which they owed to their employer, and from whom they received a pecuniary reward for their services." It will be noticed that this is a mere assertion of the liability, not an argument for it, and is entitled only to the weight naturally attaching to any utterance of the learned justice. If it were the decision of a schoolboy it would be valueless, for it lacks the innate force of reason. And when we go further into the case, we shall find that the judge's own arguments negative his conclusion upon this first point. Another question in the case was *how much* C. could recover from B. If C had so acted as to relieve A. from liability to him on the original debt for which the bill was sent, C. was damaged to the full

[1] § 277. 3 Barn. & C. 439.

amount of the draft; but if he still had his remedy against A. on the debt, he was damaged only by the delay.

(*a*) The court said C. had not so treated the draft as to absolve A. He could not have been expected to present the bill himself. "*It must have been understood that he was to do this through the medium of some other person. He employed for that purpose persons in the habit of transacting such business for himself and others, and upon whose punctuality he might reasonably rely. In doing this, we think he did all that was incumbent upon him as between* him and A.; that he is personally in no default as to them, and is not answerable to them for the default of the persons whom he employed under such circumstances." Now A. had sent the bill without indorsing it, and was therefore not entitled to notice as indorser, and the two questions in the case were therefore technically somewhat different; but fundamentally both questions amounted simply to this: Shall a person (X.) be held, in the absence of express agreement, to liability to M. for loss occasioned to him by the negligence of another, *not the servant* of X., when M. knew that by the course of business and usage of trade X. would have to employ some one, and X. has used due care in the selection of such person?

If the reason given in Italics was sufficient to convince the judge that substantial justice required him to deny such liability in the relation between C. and A., should he not have at least given some *reason* why the same decision was not rendered as to the relation between C. and B., where in the nature of things the same argument applies?

(*b*) However void of *expressed reason* Van Wart *v.* Woolley is, it is no doubt law in England. In Mackersy *v.* Ramsays,[2] Lord Cottenham said: "If there was any negligence in the conduct of the parties actually employed to receive the money, it could only affect those by whom they were so immediately employed, for certainly they were not the agents of the customer" of the first bank.

§ 278. **New York.** — The next case in line is that of Allen *v.* Merchants' Bank.[1] A bill of exchange payable at a distant place was deposited in the defendant bank for collection. The bank forwarded it to a bank in that place; which second bank put it

[2] Mackersy *v.* Ramsays, 9 C. & F. 818.

[1] § 278. 15 Wend. (N. Y.) 482 (Supreme Court); 22 Wend. (N. Y.) 215 (reversal in Court of Errors).

into the hands of a notary to present for acceptance. His failure to give notice of the refusal to accept caused a loss. The first trial was in the Supreme Court, and there it was said that the defendant bank undertook only to forward to proper parties for collection; that if the bank to which it forwarded, or the notary employed by that bank or other subsequent party, committed a default, the depositor must look to them; they became his agents directly, and could be held by him; but this defendant bank was not responsible to him for what happened after the forwarding. The cause was carried by appeal before the Court of Errors, and the decision of the Supreme Court was there reversed. But it was reversed by a small majority; fourteen senators, as we understand the report, voting for the reversal, and ten being in favor of sustaining the decision of the lower court. The case excited much interest, and all the arguments which could be conceived on behalf of either side were gathered and put forward in their most forcible shape. Senator Verplanck delivered the opinion on behalf of the majority. Chancellor Walworth spoke the views of the minority. A cause so thoroughly considered was regarded as conclusively settling the law in the State of New York. Efforts were made in subsequent cases to obtain an overruling, but they were of no effect. All subsequent cases [2] have consistently upheld the doctrine of Senator Verplanck and his thirteen coadjutors, and the question can be no longer considered an open one in New York. Though it should perhaps be added, that some eminent judges — while they have stated that they considered the question as *res adjudicata*, which it did not lie with them again to open — have used language which was doubtless intended to intimate that the adjudication was not wholly satisfactory to them.

(*a*) Senator Verplanck cites Van Wart *v.* Woolley as authority, and pushes aside Washington Bank *v.* Triplett, as being the case of an express contract for transmission only, and not for collection, which, however, we shall see, was not really so.

By way of reasoning, the senator remarks that a mere representative agency ceases with the personal acts, but an agency to do the business covers all the means employed, and there is no

[2] Downer *v.* Madison County Bank, 6 Hill (N. Y.) 648 (by implication, supports 22 Wend. 215); Montgomery County Bank *v.* Albany City Bank, and Montgomery County Bank *v.* Bank of State of New York, 7 N. Y. 459; Commercial Bank *v.* Union Bank, 19 Barb. (N. Y.) 391; 1 Kern. (N. Y.) 203; McBride *v.* Illinois National Bank, 138 App. Div. 339 (1910), 121 N. Y. S. 1040.

reason to consider a deposit for collection in another State as less an undertaking to do the business than one to collect in the same town; and surely a bank is not to be relieved from responsibility for the neglect of its teller in New York City on the ground that he was carefully selected, although the customer knew the bank must collect through agents.

(*b*) In this matter the senator fails to distinguish between cases where the one employed is the *servant* or *permanent employee* of the bank, and cases where the person employed acts independently.

In the case of a servant, the law of to-day inherits from the times of slavery the rule that holds the master responsible, and it is too firmly fixed to be easily overturned; but that does not justify extension of such liability to cases not within the iron rule of precedent, unless a good reason can be found for so doing.

Assuming that a contract to collect through a correspondent is not a case of personal agency, but an agreement to do the business that "covers all the necessary and proper means for the accomplishment of the object, by whomsoever used or employed", is begging the very question in dispute. Besides, this language would cover notaries as well as any other "means", and yet, as we shall see, authority is almost in unison that the bank is not responsible for the negligence of a notary in respect to demand and protest, *for he is an independent agent whose duties are prescribed by law, and the bank has done all in its power toward the undertaking when it selects a notary with reasonable care.*

So also is a correspondent bank an independent agent, whose duties are just as truly prescribed by law; and if it be said the notary's good conduct is secured by official bond, the answer is, that this is not the ground of holding the bank free, for in some States, Massachusetts for example, where the bank is not held for the negligence of its notary, no bond is required; and even if this were the ground, a correspondent bank is probably on the average fully as responsible financially as a notary and his sureties.

The senator's argument seems wofully deficient in that it takes no note of the element of *control* in determining liability, and in that it is mere assertion, and involves the fallacy of "Sufficient Reason" (see Mill's System of Logic, p. 464), that because he sees no reason why a certain thing should not be so, therefore it is so, and clashes with the whole force of the law as to notaries.

§ 279. **Ohio.** — The court in Ohio acknowledged itself, after a review of some of the chief authorities, to be "rather bewildered by

the conflict than aided"; but considering the question an open one, it preferred, on the whole, to follow the principle finally adopted in New York.[1] This court also took the ground of the House of Lords in Mackersy *v.* Ramsays, though here there was no such special agreement as to the time when credit was to be given to the owner as there had been in that case. They say that payment to the collecting bank is payment to the first bank, and so soon as the payment is received by such collecting bank the first bank becomes at once a debtor to the owner of the paper to that amount.

§ 280. **United States Cases.** — The undertaking to collect is not merely a contract to send to a suitable agent, but is an undertaking to respond for any default of the agent selected.[1]

In The Exchange National Bank *v.* The Third National Bank,[1a] the United States Supreme Court decided to follow the New York rule. The court said: The bank's "undertaking is to do this thing, not merely to procure it to be done. In such a case, the bank is held to agree to answer for any default in the performance of its contract, and whether the paper is to be collected in the place where the bank is situated, or at a distance, the contract is to use the proper means to collect the paper, and the bank, by employing sub-agents to *perform a part of what it has contracted* to do, becomes responsible to its customer."

The nature of the contract is the test. If it is for immediate service of the agent and for his faithful conduct as representing his principal, the responsibility ceases with the limits of the personal service undertaken, but where the contract looks mainly to the thing to be done, and undertakes for the due use of all proper means, the responsibility extends to all necessary and proper means, by whomsoever used.

Whenever the agency is an undertaking to do the business, the original principal may look to the immediate contractor with himself, and is not obliged to look to inferior or distant under-contractors or sub-agents when defaults occur injurious to his interests. "On any other rule no principal contractor would be liable for the default of his own agent, where from the nature of the business it was evident that he must employ sub-agents."

[1] § 279. Reeves *v.* State Bank, 8 Ohio St. 465.

[1] § 280. Kent *v.* Dawson Bank, 13 Blatchf. 237.

[1a] 112 U. S. 276, 28 L. ed. 722, 5 Sup. Ct. 141. See California National Bank *v.* Utah National Bank, 190 Fed. 318 (1911); Smith *v.* National Bank, 191 Fed. 226 (1911).

(*a*) This is simply the New York decision over again, Senator Verplanck verbatim to a great extent, and includes all his fallacies and some others, as we shall see.

The last sentence quoted and in fact the whole opinion utterly ignores the well settled rules of law, that where an agent has authority, either expressly given, or implied from the usage of trade, or the course of his own dealings, or from the exigencies of the case, to employ a sub-agent, and does so employ *one who is not his own servant*, there is a privity between the sub-agent and the principal, and the agent is not responsible for the neglect or misconduct of the sub-agent, unless by him directed or ratified.

The parties to a contract are presumed to contract in reference to well established usage, in this particular as in others.[2] The very question is whether the contract to collect can be fairly construed to be, by the understanding of the parties, an agreement that the first bank shall personally or by its servants do the collecting in the distant city, or whether, considering that the usage of trade is universal and well established to send the paper to some correspondent bank entirely independent of the first, and not its servant any more than a lawyer is the servant of his client, and considering that no compensation is taken by the first bank at all commensurate with such a risk as that of loss by negligence of the sub-agents, it is not fairer to construe the contract intended to be simply one of transmission; and if so, then the question arises, Is there good reason on any other grounds for extending the liability of the first bank beyond the consequences of its *own* lack of due care and that of its servants?

The court does not give any reason for its decision that will stand analysis for a moment; it merely says, if it is a contract to do the whole business, it is responsible for the sub-agents it employs to do part of what it has contracted to do, and then assumes that it is such a contract, whereas all the sense of the matter is that the bank *does not* employ the sub-agent to do part of what it contracted to do itself, but that in the light of usage the agreement was only to employ some sub-agent to do that part of the business.

(*b*) How very tissuey the opinion is we shall see still more clearly on noticing the manner in which it treats Bank of Washington *v.* Triplett, saying of it, "The question under consideration (here) was not presented in 1 Pet. 25; for although the defendant

[2] Story on Agency, §§ 201, 217 *a*.

bank in that case was held to have contracted directly with the holder of the bill to collect it, the negligence alleged was the negligence of its own officers in the place where the bank was situated." But on turning to the Triplett case we find the question was presented, and necessarily presented, and was decided clearly against the decision in Exchange Bank *v.* Third National Bank, and the court, perhaps in order to avoid appearing to overrule so clear a decision of C. J. Marshall, disposes of it in the above rather misleading way.

The Bank of Washington, the defendant, was the correspondent bank, and being sued by Triplett, the owner of the draft, who had given it to the Mechanics' Bank to collect, the first question necessarily was whether the Washington Bank was the agent of the Mechanics' Bank or of Triplett, for agents are not liable for nonfeasance or omissions except to their own principals;[3] the matter was one of contract, and privity was necessary between Triplett and Bank of Washington in order to hold the latter.

(*c*) The defendant in fact insisted that there was no privity between the holder and itself, that it was not the agent of Triplett but of the Mechanics' Bank, and the court said, "The deposit of a bill in one bank, to be *transmitted* for collection to another, is a common usage of great public convenience, the effect of which is well understood. This transaction *was unquestionably of that character.* The custom to indorse a bill put in bank for *collection* is universal, and the Bank of Washington had no more reason for supposing that Triplett had ceased to be the real holder from such indorsement (in blank) than for supposing that the cashier of the Bank of Washington had become the real holder by the indorsement to him (by the Mechanics' Bank). It is the customary proceeding for collection in such cases. . . . The court is decidedly of the opinion that the Bank of Washington, by receiving the bill for collection, became the agent of Triplett."

(*d*) We see that C. J. Marshall uses the words "for transmission" and "for collection" interchangeably in regard to the same transaction; and indeed the facts of this case were the same as in all the other cases, and the use of the word "transmission" merely expresses the view the court takes of the facts, and we see that the court does emphatically declare the correspondent bank to be the agent of the holder. So that Exchange Bank *v.* Third National Bank really overrules C. J. Marshall, and with no reason *expressed*

[3] Story on Agency, § 130.

that will bear the light, *though it is probable the judges had some reason* which did not shape itself into words.

The cases are rather unsatisfactory. The United States is based on New York, and New York on Van Wart *v.* Woolley, plus fallacy, with probably a feeling of public convenience and policy which did not find expression.

Cases Denying the Liability of a Bank for the Negligence of its Correspondent

§ 281. **United States.** — The authority of Chief Justice Marshall rests upon this side of the question; see his decision in Bank of Washington *v.* Triplett,[1] discussed above, § 280 *c*.

§ 282. **New York.** — Although the actual decision was, by four votes out of twenty-four, that the first bank shall be liable, yet the weighty dissent of Chancellor Walworth is entitled to notice on this side of the question. His arguments are, —

(1) That there is no consideration taken by the principal bank beyond the exchange and expenses of negotiation; often the whole labor and expense, except the mere exchange, is borne by the bank in order to draw business, and there is no consideration taken to cover the risk of loss of the whole amount of the paper by the negligence of a correspondent, as it is certainly reasonable to suppose there would be if any such risk was contemplated by the parties.

(2) The loss should fall on the owner, who has impliedly authorized the employer of a sub-agent, by entering into a contract in the performance of which such employment of a sub-agent is an established usage, and not providing against the inference of law that he contracted in reference to such usage by any express term in his contract.

§ 283. **Pennsylvania.** — In Pennsylvania the law is strongly stated against the liability of a bank for its correspondent.[1]

"A bank with which a check is deposited by a customer for collection, under an agreement that the depositor's responsibility as indorser is to continue until payment is ascertained by the bank, is bound to transmit such check to an independent agent for collection, with instructions to present the same for payment, and if

[1] § 281. 1 Pet. 25, 7 L. ed. 37.

[1] § 283. Merchants' National Bank *v.* Goodman, 109 Pa. St. 422, 2 Atl. 687.

payment be refused, to have the same protested and returned at once."

The agreement to transmit for collection is a contract between the bank and its customer; the valuable consideration which supports the agreement as a contract is the use of the money to be collected by the bank as long as it shall be allowed to remain in their hands after it is collected. This binds the collecting bank to do all that is incumbent on them to do; and that entire duty, as we have said, is discharged when the check or draft is transmitted to a responsible sub-agent to collect the money. The agent to whom the instrument is sent to make demand for payment then becomes the agent of the depositor or indorser, and is liable to such depositor for loss arising from failure on his part to perform the duty which is incident to an undertaking to collect the money; and such duty is not discharged when anything but money is accepted as payment, in the absence of special authority to the contrary.

The law, as we have stated it, is well settled on the authority of decided cases in this country.

"Triplett, having deposited a bill with a bank in Alexandria to be collected in Washington, the Alexandria bank forwarded the bill to the Bank of Washington, which by negligence failed to collect the bill." By transmitting the bill, as directed, the bank with whom it was deposited performed its duty, and the whole responsibility of the collection devolved on the bank which received the bill for the purpose. To the same effect are 23 Pickering 330; 1 Cushing 182; 12 Conn. 303; 25 Ill. 247; 1 Otto 308.

In Pennsylvania, in 1834, the court said: The undertaking of the first bank is clearly to transmit the bills; that this was the intention of both parties must be inferred from the transaction. This bank is used simply as a "medium of communication." If the plaintiff contended that it undertook "*to collect*", that was a material fact which should have been passed upon by the jury. Hence the banks do not stand in the relation of principal and agent towards each other. But the first is the agent for transmission; the second is the agent for collection; *ergo*, the first is not bound to answer for the doings of the second.[2] In 1848 the same view was incidentally adopted.[3] In Bellemire *v.* United States Bank,[4] the

[2] Mechanics' Bank *v.* Earp, 4 Rawle (Pa.) 384.
[3] Wingate *v.* Mechanics' Bank, 10 Barr (Pa.) 104.
[4] 1 Miles (Pa.) 173; 4 Whart. (Pa.) 105.

same ground was gone over in both the lower and the highest courts of the State with the same result. The ruling in Mechanics' Bank *v.* Earp was deliberately repeated and affirmed as being the law in Pennsylvania. It was urged that the bank had undertaken "the whole business of collection", and in proof of this it was shown that the paper had been indorsed over to the bank by an unrestricted indorsement. But the court considered that, though the bank was holden by such an indorsement, its situation was rendered in no respect peculiar by this fact. It was invested with the apparent ownership only that it might have authority to present for payment. As simple agent it was held only to act in good faith and "according to the regular and accustomed course of the business; and was not responsible though such action might not prove to be to the best advantage." The bank, from its nature, is obliged to employ agents, in this case a notary, who is not alleged to have been incompetent. The owner of the paper, in omitting to desire a special agent to be employed, consented to let the matter take the ordinary course, and the bank performed its duty in committing the paper to the hands of the person whom it employed in its own like concerns.

§ 284. **Iowa.** — Where the holder of a bill of exchange payable at a distant place deposits it with a local bank for collection, he thereby assents to the course of business of banks to collect through correspondents, and the correspondent of the local bank to which the bill is forwarded becomes his agent, and is responsible to him directly for negligence in failing to present the bill for payment in the proper time.[1]

§ 285. **Mississippi.** — A bank receiving a draft for collection at another place, and transmitting the draft to its *agent carefully* selected at the acceptor's residence, is not liable for the agent's neglect.[1]

In this case the court followed a line of decisions [2] in the same State, and referred to those of eight States [3] in agreement with its conclusion. The chief justice dissented, quoting cases,[4] which, as

[1] § 284. Guelick *v.* National State Bank of Burlington, 56 Iowa 434, 9 N. W. 328 (1881).

[1] § 285. Third National Bank of Louisville *v.* Vicksburg Bank, 61 Miss. 112 (1883).

[2] Hoover *v.* Wise, 91 U. S. 308, 23 L. ed. 392 (1875); Bradstreet *v.* Everson, 72 Pa. St. 124 (1872); Morgan *v.* Tener, 83 Pa. St. 305.

[3] Massachusetts, Maryland, Connecticut, Missouri, Illinois, Iowa, Tennessee, and Wisconsin.

[4] Tiernan *v.* Commercial Bank, 7 How. (Miss.) 648; Agricultural Bank

we have seen, have no bearing on the question, because in each of them the sub-agent was the servant of the agent in chief, or in his permanent employ and under his control and direction, really one of his own arms, attached to the main body, and not an independent person, and in most of them the express terms of the contract indicated that the undertaking was to do the collecting in the distant place through its *own branches* and permanent agencies, and the consideration for the collection also was not of the meagre character which so strongly excludes the supposition that the agent intended to take the risk of losing the principal.

§ 286. **Massachusetts.** — In Massachusetts it was held, in 1848, that if the first bank selects proper sub-agents for accomplishing the transmission and making the collection, it discharges its full duty, and is not liable for their default. If the note has been indorsed over to it generally, it may indorse over to sub-agents in the same form, and need not make a restricted indorsement. In delivering the opinion, Judge Wilde said that the final decision in Allen *v.* Merchants' Bank (*supra*) "is opposed to a number of decisions of great authority, and is not, as we think, well founded in principle." [1]

The employment of a sub-agent is justifiable, because this manner of conducting business is the usual and known custom, and "in a business which requires or justifies the delegation of an agent's authority to a sub-agent, who is not his own servant, the original agent is not liable for the errors or misconduct of the sub-agent if he has exercised due care in the selection." [2]

§ 287. **Other States.** — In Connecticut the court said, in the first case which they were called upon to consider, that of Lawrence *v.* Stonington Bank,[1] that the *transmittee* bank was the attorney, not the factor, of the transmitting bank, and had for its principal not the transmitting bank itself, but the original holder and depositor of the paper; whence it followed that the defaults of each bank in the order of succession were not the defaults of any predecessor in the transmission, but of the original customer and principal himself. Later, the same court declared that a person who deposits in a bank a note which is payable elsewhere must know that all the

v. Commercial Bank, 7 Sm. & M. (Miss.) 592; Bowling *v.* Arthur, 34 Miss. 41. These were notary cases, but the reasoning was general.

[1] § 286. Dorchester & Milton Bank *v.* New England Bank, 1 Cush. (Mass.) 177; Fabens *v.* Mercantile Bank, 23 Pick. (Mass.) 330.

[2] Darling *v.* Stanwood, 14 Allen 504.

[1] § 287. 6 Conn. 521.

bank can do is to send it on to a reputable correspondent; and if the bank does this, it should be thereby fully exonerated. It would be an unreasonable hardship to hold the bank for the defaults of such further agents.[2] In Louisiana it has been held that the bank does enough if it gives the note to its regular notary, and is not liable for his default.[3] In Illinois it was said that a bank was not liable for the default of the sub-agent, if it had exercised due diligence in the selection.[4] The same doctrine is adopted by a fair implication in the ruling in the Wisconsin case, cited in the margin,[5] and in Kentucky.[5a] In Maryland the first bank is not regarded as liable for defaults of sub-agents, whether banks or notaries; but it is fair to say that the first decision was based on proof of usage in the State, or at least in the city of Baltimore.[6] The same view has recently been directly asserted in Missouri;[7] and the tendency of the court might previously have been inferred to be in favor of it, from the form of the opinion and the language used therein, delivered in the case of Gerhardt *v.* Boatman's Savings Institution.[8]

[2] East Haddam Bank *v.* Scovil, 12 Conn. 303.

[3] Hyde *v.* Planters' Bank, 17 La. 560; Baldwin *v.* Bank of Louisville, 1 La. Ann. 13.

[4] Ætna Insurance Co. *v.* Alton City Bank, 25 Ill. 243.

[5] Stacy *v.* Dane County Bank, 12 Wis. 629.

[5a] Falls City Woolen Mills *v.* Louisville National Bank, 145 Ky. 64, 140 S. W. 66 (1911); Commercial National Bank *v.* First National Bank, 158 Ky. 392, 165 S. W. 398 (1914).

[6] Jackson *v.* Union Bank, 6 Har. & J. (Md.) 146; Citizens' Bank *v.* Howell, 8 Md. 530.

[7] Daly *v.* Butchers & Drovers' Bank of St. Louis, 56 Mo. 94; Landa *v.* Traders' Bank, 118 Mo. App. 356, 94 S. W. 770 (1904).

[8] 38 Mo. 60.

CHAPTER XVIII

GENERAL DEPOSIT

§§ 186, 565, Title.

A deposit of loose money is presumed to be general.

§ 289. The relation of the bank to the depositor of good money is that of debtor and creditor. Upon crediting the deposit, the bank is liable to the depositor, though the deposit should be lost or stolen without its fault; the deposit be-

§ 289 *b*. comes, in every sense, its property; if it makes a payment on account of it, it is its own money that is paid; and if the bank becomes

§ 289 *c*. *Insolvent*, the depositor cannot claim in preference to the general creditors, unless the deposit was not fully received, or the receiving was a fraud upon the depositor. § 629.

(*d*) Forged paper or counterfeit coin is nothing, and cannot form a deposit; though, if a bank is negligent in not discovering a forgery of its own bills, it will have to bear any resulting loss, in the absence of fraud on the depositor's part. § 659.

Bills of an insolvent bank are, according to the best opinion, received at the risk of the bank, if there is no fraud or concealment on the part of the depositor. §§ 633, 662.

Checks on the depository bank, credited as cash, create the relation of debtor and creditor, and the title passes to the bank, unless the depositor knew the check was not good for lack of funds. § 565.

Checks on other banks, notes, bills, etc., merely credited as cash, without further agreement, become a general deposit as against the depositor, if he knows they are so credited; but as against the bank the credit is conditional, and may be cancelled if the paper is not paid at maturity without default. § 565.

Paper, credited as paper, is not a general deposit.

§ 289 *d*. Fraud or concealment on the part of the depositor will vitiate the contract of deposit, and make it voidable at the option of the bank.

§ 289 *e*. Suits by depositors.

Writings in the Course of Banking Business.

§ 290. Deposit tickets, pass-books, books of the bank, and their effect.

§ 291. All entries and written statements contained in the above, made in the course of business, are merely *prima facie* evidence,

(*c*) and are subject to control by parol. The books of the bank

§ 295. are more open to error than the pass-books, for these last usually contain original entries made at the time of deposit, while the books of the bank are written up afterward by copying, so admitting of more chance of error.

§ 295 *f*. Parol is admissible to supply the place of a record in the books of the bank, even though statute law requires the bank to keep a record of transactions of the nature of the one to be proved, and this has not been done.

§ 295 *e*. Entries are competent evidence of the nature of a deposit, as general, special, or specific.

Are admissible in favor of bank. § 295. Or against it. § 171 *i*.

§§ 290, 291. Mistakes may be corrected by either party, subject to the rule that each party must bear any loss resulting to the other by reason of acting on the faith of an entry made by him, or his negligent acquiescence.

§ 291. No by-law of the bank can destroy this right of correction in the depositor. Nothing short of express agreement will suffice.

§ 292. Silence may estop the depositor as to charges actually made in account stated to him, but cannot give authority for future similar charges.

§ 295. The name in the bank-book is not conclusive as to the ownership of the deposit.

Proof of entries should be by the entering clerk, if possible.

§ 294. Right of depositor to inspect books is confined to such portions as concern his own transactions with the bank.

§ 294 *a*. Right of others to know the state of a depositor's account is

(1) conceded in the case of a garnishee creditor, but has been

(2) denied as to check-holders and as to third persons in general. This, so far as concerns a check-holder in case of insufficient funds, is questionable. The depositor has transferred to him his own right in the deposit, right of inquiry and all; it is his (the check-holder's) deposit on presentation of the check, if he sees fit to accept it, and he may not be able to decide that until he knows the amount.

§ 296. Certificate of Deposit. (See Analysis, § 296.)

§ 309. Interest Accounts.

A general deposit bears no interest except by

(1) (*b*) Agreement.

(2) Usage or course of dealing.

(3) After unjustifiable delay or refusal of payment.

(*b*) Usury Laws cannot be overcome by usage. (So it is said by the judges, in spite of the fact that discounting and "rests", which by force of usage have claimed and secured recognition by the law, do circumvent the usury laws.)

(*d*) Death, Insolvency, or Settlement terminates a contract as to rate of interest on a deposit and thereafter interest is calculated at the ordinary rate for simple debt.

§ 327. Appropriation of.

§ 289. **Relation of the Customer on a Simple Deposit Account.** — The ordinary relation existing between a bank and its customer,[0] if not complicated by any further transaction than that of the depositing and withdrawing of moneys by the customer from time to time, is simply that of debtor and creditor at common law,[1] whether the deposit [1a] is on demand or on time.[2] The original and every subsequent deposit by the customer is in strict legal effect a loan [2a] by the customer to the bank, and *e converso* every payment by the bank to or on account of the customer is a repayment of the loans *pro tanto*.[2b]

All sums paid into the bank on general deposit by the same or different depositors form one blended fund.[3] So soon as the money has been handed over by the payer, it is at once the proper money of the bank.[4] It enters into the general fund and capital, and is undistinguishable therefrom. Thereafter the depositor has only a

[0] § 289. The deposit of money in the name of G. and the delivery of the pass book to her makes her a customer of the bank. Second National Bank *v.* Gibboney, 43 Ind. App. 492, 87 N. E. 1064 (1908).

[1] Bank of Republic *v.* Millard, 10 Wall. 152, 19 L. ed. 897; Neely *v.* Rood, 54 Mich. 134, 19 N. W. 920; Perley *v.* Muskegon County, 32 Mich. 132 (1875); Commercial Bank *v.* Hughes, 17 Wend. (N. Y.) 100; Foley *v.* Hill, 2 H. L. Cas. (Eng.) 278; Engel *v.* O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. 190 (1910).

[1a] The term "deposit" under the Vermont Tax Act means the credit which the depositor receives for the money deposited. State *v.* Clement National Bank, 84 Vt. 167, 78 Atl. 944, 1912D Ann. Cas. 22, n.

An agreement that a party may check on the bank for a car load of horses is equivalent to putting the amount of money necessary to purchase the horses at his credit for that purpose. Falls City State Bank *v.* Wehrli, 68 Neb. 75, 93 N. W. 994 (1903).

[2] Williams *v.* Rogers, 14 Bush (Ky.) 776.

[2a] A deposit is neither a loan nor a bailment in the strict sense but is a transaction peculiar to banking. Elliott *v.* Capital City State Bank, 128 Iowa 275, 103 N. W. 777, 111 Am. St. Rep. 198, 1 L. R. A. (N. S.) 1130, n. (1905). See also Hunt *v.* Hopley, 120 Iowa 695, 95 N. W. 205 (1903); State *v.* Corning State Sav. Bank, 136 Iowa 79, 113 N. W. 500 (1907); Officer *v.* Officer, 120 Iowa 389, 94 N. W. 947, 98 Am. St. Rep. 365, n. (1903); Boyd *v.* Schneider, 131 Fed. 223 (1904); Warren *v.* Nix, 97 Ark. 374, 135 S. W. 896 (1911); Pendleton *v.* Commonwealth, 110 Va. 229, 65 S. E. 536 (1909).

In the popular sense a deposit is a receipt of money for safe keeping. Engel *v.* O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. 190 (1910).

[2b] Schinotti *v.* Whitney, 130 Fed. 780 (1904).

[3] Devaynes *v.* Noble, 1 Mer. (Eng.) 541; Bodenham *v.* Purchas, 2 Barn. & Ald. (Eng.) 39; Henniker *v.* Wigg, 4 Q. B. (Ad. & El.) (Eng.) 792; Commercial Bank of Albany *v.* Hughes, 17 Wend. (N. Y.) 94.

[4] Seward County Commissioners *v.* Cattle, 14 Neb. 144, 15 N. W. 337; Citizens' State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064 (1914); Davenport *v.* State Banking Co., 126 Ga. 136, 54 S. E. 977, 115 Am. St.

debt owing him from the bank; a chose in action, not any specific money, or a right to any specific money.[5]

This relation of debtor and creditor is not changed by reason of the fact that the depositor "purchases" from the bank two drafts on another bank, and pays therefor by his check against his deposit, and leaves the draft at the bank. Such a transaction does not constitute the bank a trustee of the drafts, entitling the depositor to a preference over general creditors, the bank having become insolvent.[5a]

(*a*) A bank may assume the functions of trustee, quasi trustee, factor, or agent, as we have seen;[6] but as to a simple deposit for general credit all efforts to hold the bank to the duties of these relations have failed both in England and the United States, the courts uniformly holding the relation to be that of debtor and creditor.[7]

Rep. 68, n., 8 L. R. A. (N. S.) 944, n. (1906); McGregor *v.* Battle, 128 Ga. 577, 58 S. E. 28, 13 L. R. A. (N. S.) 185, n. (1907).

In effect the money is kept under the control of the depositor. Warren *v.* Nix, 97 Ark. 374, 135 S. W. 896 (1911).

[5] Marine Bank *v.* Fulton Bank, 2 Wall. 252, 17 L. ed. 785; Thompson *v.* Riggs, 4 Wall. 663, 18 L. ed. 704; National Bank of Republic *v.* Millard, 10 Wall. 152, 19 L. ed. 897; Ætna National Bank *v.* Fourth National Bank, 46 N. Y. 82; Carr *v.* National Security Bank, 107 Mass. 45; First National Bank *v.* Ocean National Bank, 60 N. Y. 278; Warren *v.* Nix, 97 Ark. 374, 135 S. W. 896 (1911); Davenport *v.* State Banking Co., 126 Ga. 136, 54 S. E. 977, 115 Am. St. Rep. 68, n., 8 L. R. A. (N. S.) 944, n. (1906); Citizens' State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064 (1914); Hoskins *v.* Velasco National Bank, 48 Tex. Civ. App. 246, 107 S. W. 598 (1908); Templeman *v.* Hutchings, 24 Tex. Civ. App. 1, 57 S. W. 868 (1900); New York County National Bank *v.* Massey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. 199 (1904).

[5a] Jewett *v.* Yardley, 81 Fed. 920 (1897).

[6] See Grant on Bankers and Banking, 3d ed., pp. 5, 11; Crosskill *v.* Bower, 32 Beav. (Eng.) 86; 32 L. J. Ch. (Eng.) 540; Shiells *v.* Blackburne, 1 H. Bl. 159 (per Lord Loughborough).

[7] English cases: Foley *v.* Hill, 2 H. L. Cas. 39; Crosskill *v.* Bower, 32 Beav. 86; Carr *v.* Carr, 1 Mer. 541, n.; Bishop *v.* Countess of Jersey, 2 Drew. 143; Devaynes *v.* Noble, 1 Mer. 541; Bellamy *v.* Majoribanks, 8 Eng. L. & Eq. 517; Sims *v.* Bond, 5 Barn. & Ad. 392; 2 Nev. & Man. 608; Watts *v.* Christie, 11 Beav. 456; Pott *v.* Clegg, 16 M. & W. 321; *In re* Agra & Masterman's Bank, *Ex parte* Waring, 36 L. J. Ch. 151; Grant on Bankers and Banking, p. 4. American cases: National Bank *v.* Eliot Bank (in which, however, there is a long dissenting opinion, delivered by Abbott, J.), 20 Law Rep. (O. S.) 138; 10 Monthly L. Rep. N. S. 138; Commercial Bank of Albany *v.* Hughes, 17 Wend. (N. Y.) 94; Bullard *v.* Randall, 1 Gray (Mass.) 605; Chapman *v.* White, 2 Seld. (N. Y.) 412; Downes *v.* Phœnix Bank, 6 Hill (N. Y.) 297; Foster *v.* Essex Bank, 17 Mass. 479; Bank of Northern Liberties *v.* Jones, 42 Pa. St. 536; Marsh *v.* Oneida Central Bank, 34 Barb. (N. Y.) 298 (citing

It follows that, the act of deposit having been once consummated, nothing short of payment on the part of the bank, or some

many authorities); Curtis *v.* Leavitt, 15 N. Y. 9; Bank of the Republic *v.* Millard, 10 Wall. 152, 19 L. ed. 897; Bank *v.* Brewing Co., 50 Ohio St. 151 (1893); Clason *v.* City, 46 La. Ann. 1 (1894); Eshleman *v.* Bolenius, 144 Pa. St. 269, 22 Atl. 758; Law's Estate, *id.*, 499; Hawes *v.* Blackwell, 107 N. C. 200, 12 S. E. 245 (1890), citing Boyden *v.* Bank, 65 N. C. 13; Shipman *et al. v.* Bank, 126 N. Y. 318, 27 N. E. 371; O'Connor *v.* Mechanics' Bank, 124 N. Y. 324, 26 N. E. 816; Alston *v.* State, 92 Ala. 124, 9 So. 732 (1890); Southern Hardware Co. *v.* Lester, 166 Ala. 86, 52 So. 328 (1910); Curtis *v.* Parker, 136 Ala. 217, 33 So. 935 (1903); Steelman *v.* Atchley, 98 Ark. 294, 135 S. W. 902, 32 L. R. A. (N. S.) 1060 (1911); Bank of Hartford *v.* McDonald, 107 Ark. 232, 154 S. W. 512 (1913); Covey *v.* Cannon, 104 Ark. 550, 149 S. W. 514 (1912); Smiths' Cash Store *v.* First National Bank, 149 Cal. 32, 84 Pac. 663, 5 L. R. A. (N. S.) 870, n. (1906); Manitou *v.* First National Bank, 37 Colo. 344, 86 Pac. 75 (1906); Patten *v.* American National Bank, 15 Colo. App. 479, 63 Pac. 424 (1900); National Dredging Co. *v.* Farmers' Bank, 6 Penn. (Del.) 580, 69 Atl. 607, 130 Am. St. Rep. 158, 16 L. R. A. (N. S.) 593 (1908); Camp *v.* First National Bank, 44 Fla. 497, 33 So. 241, 103 Am. St. Rep. 173 (1902); Lamar *v.* Taylor, 141 Ga. 227, 80 S. E. 1085 (1913); Woodhouse *v.* Crandall, 197 Ill. 104, 64 N. E. 292, 58 L. R. A. 385 (1902); Sacks *v.* Sacks, 181 Ill. App. 342 (1913); Shopert *v.* Indiana National Bank, 41 Ind. App. 474, 83 N. E. 515 (1907); McBee *v.* Purcell National Bank, 1 Ind. T. 288, 37 S. W. 55 (1896); Kuhnes *v.* Cahill, 128 Iowa 594, 104 N. W. 1025 (1905); Commercial Banking etc. Co. *v.* Citizens' Trust etc. Co., 153 Ky. 566, 156 S. W. 160, 1915C Ann. Cas. 166, n., 45 L. R. A. (N. S.) 950, n.; Robinson *v.* Bank of Pikeville, 146 Ky. 538, 142 S. W. 1065, 37 L. R. A. (N. S.) 151, n. (1912); American National Bank *v.* Morey, 113 Ky. 857, 66 S. W. 759, 101 Am. St. Rep. 379, 58 L. R. A. 956 (1902); Lonier *v.* State Savings Bank, 149 Mich. 483, 112 N. W. 1119 (1907); Mitchell *v.* Bank of Indianola, 98 Miss. 658, 54 So. 87 (1910); Kenneth Inv. Co. *v.* National Bank, 96 Mo. App. 125, 70 S. W. 173 (1902); Arnold *v.* Sedalia National Bank, 100 Mo. App. 473, 74 S. W. 1038 (1903); First National Bank *v.* City National Bank, 102 Mo. App. 357, 76 S. W. 489 (1903); O'Grady *v.* Stotts City Bank, 106 Mo. App. 366, 80 S. W. 696 (1904); Butcher *v.* Butler, 134 Mo. App. 61, 114 S. W. 564 (1908); Gupton *v.* Carr, 147 Mo. App. 105, 125 S. W. 849 (1910); Dixon *v.* Jackson Exch. Bank, 149 Mo. App. 585, 129 S. W. 481 (1910); Wilson *v.* Farmers' Bank, 176 Mo. App. 73, 162 S. W. 1047 (1914); Missouri Pacific Ry. Co. *v.* Continental National Bank, 212 Mo. 505, 111 S. W. 574, 17 L. R. A. (N. S.) 999 (1908); Vandagrift *v.* Masonic Home, 242 Mo. 138, 145 S. W. 448 (1912); Citizens' State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064 (1914); State *v.* People's National Bank, 75 N. H. 27, 75 Atl. 542 (1908), even though the bank has a savings department; Fricano *v.* Columbia National Bank, 118 App. Div. 567 (1907), 103 N. Y. S. 189; Parks *v.* Knickerbocker Trust Co., 137 App. Div. 719 (1910), 122 N. Y. S. 521; Baldwin's Bank *v.* Smith, 215 N. Y. 76, 109 N. E. 138 (1915); Hilsinger *v.* Trickett, 86 Ohio St. 286, 99 N. E. 305, 1913D Ann. Cas. 421, n.; Nodine *v.* First National Bank, 41 Or. 386, 68 Pac. 1109 (1902); Commonwealth *v.* Stone, 236 Pa. St. 35, 84 Atl. 659 (1912); *In re* Prudential Trust Co.'s Assignment, 223 Pa. St. 499, 72 Atl. 798 (1909); State *v.* Grills, 35 R. I. 70, 85 Atl. 281 (1912); Wagner *v.* Citizens' Bank etc.

act of the depositor himself, will suffice to exonerate it from the indebtedness it has assumed.[7a] The identical bag of coin or roll of bills in which the deposit was made may be stolen, before it has been in any practical manner commingled with the funds of the bank; it may be embezzled or fraudulently misapplied by an officer of the bank; still the indebtedness of the bank subsists, entirely unaltered by these circumstances. Neither the intentional nor the accidental segregation of the specific moneys (unless by distinct agreement with the depositor a "special deposit" is effected [8]) will enable the bank to follow them, and to affect its customer with their fate.[9]

True Owner of General Deposit cannot Follow it against Bona Fide Holder

(*b*) It also results that the true owner of a general deposit cannot follow a payment made out of it, for it is the money of the bank that is paid. §§ 565, 567, 621.

D. drew on his debtor, H., and sent the draft to bank B. for collection. H. paid a part properly, and directed the bank where the firm of H. and S. had their deposit to pay the remainder from

Co., 122 Tenn. 164, 122 S. W. 245, 135 Am. St. Rep. 869, 28 L. R. A. (N. S.) 484, n. (1909); State *v.* Clement National Bank, 84 Vt. 167, 78 Atl. 785, 1912D Ann. Cas. 22, n.; Wood *v.* American National Bank, 100 Va. 306, 40 S. E. 931 (1902); Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804 (1901); Brown *v.* Lynchburg National Bank, 109 Va. 530, 64 S. E. 950 (1909); *In re* Salmon, 145 Fed. 649 (1906); Levy *v.* Larson, 167 Fed. 110 (1909); Havana Central R. Co. *v.* Central Trust Co., 204 Fed. 546 (1913); New York County Bank *v.* Massey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. 199 (1912); Burton *v.* United States, 196 U. S. 283, 49 L. ed. 482, 25 Sup. Ct. 243 (1904); Kepitigalla Rubber Estate *v.* National Bank (1909), 2 K. B. 1010.

[7a] Robinson *v.* Bank of Pikeville, 146 Ky. 538, 142 S. W. 1065, 37 L. R. A. (N. S.) 151, n. (1912).

The bank assumes no further obligation than to pay the amount received when it shall be demanded at the banking house. Elliott *v.* Capital City State Bank, 128 Iowa 275, 103 N. W. 777, 111 Am. St. Rep. 198, 1 L. R. A. (N. S.) 1130 (1905).

When the bank of C. wired the L. N. Bank that the A. Co. had deposited with it for credit of the L. N. Bank for use of B. $1000 which telegram was received after banking hours, and the order was countermanded by wire the following morning before credit had been given thereof and before the rights or liabilities of B. or other parties had been incurred in regard thereto the bank of C. had the right to countermand such order and the L. N. Bank was not liable to B. for such deposit. Brinton *v.* Lewiston National Bank, 11 Idaho 92, 81 Pac. 112 (1905).

[8] Marine Bank *v.* Fulton Bank, 2 Wall. 252, 17 L. ed. 785.

this deposit, which was done. *Held*, that neither the firm nor S. could recover *from D.* D. did not receive any money of the firm, for the money on deposit in the bank was not the firm's money, but the bank's.[10]

Insolvency. Deposit after Banking Hours Kept Separate, etc.

(*c*) The relation of the depositor to the bank being that of a simple creditor, if the bank goes into insolvency the depositor has no right to any preference; but shall come in like any other ordinary creditor.[11] But if a deposit is never really received by the bank, it may be recovered by the crown as against the creditors of the bank upon its failure; as where the deposit was kept separate and not credited, it being paid in after banking hours on the day before failure [12] (the bank did not again open after receiving the deposit). But where it has been customary to make deposits after banking hours and treat them as proper deposits, and a deposit is received as usual, subsequent insolvency cannot affect the case.[13] And even insolvency (actual but not yet avowed) at the time of receiving a deposit, whether known or not to the officers of the bank, will not prevent the property from passing to the bank, unless the reception of it amounts to a fraud on the depositor. (§ 629.)

Deposit in Forged Paper or Base Coin

(*d*) If the deposit be made in forged paper or in base coin, although the nominal amount be duly passed to the depositor's credit, yet no indebtedness shall accrue; for a deposit made in such material is not a payment, and can in no wise affect the relationship previously existing between the parties. It goes absolutely for nothing; and as it is a familiar rule that the transfer of such worthless stuff could not discharge a debt, so, on the other hand, it is equally clear that it cannot create one.[14]

[9] Concord *v.* Concord Bank, 16 N. H. 26; Commercial Bank of Albany *v.* Hughes, 17 Wend. (N. Y.) 94.

[10] Davis *v.* Smith, 29 Minn. 201, 12 N. 531 (1882).

[11] *In re* Franklin Bank, 1 Paige (N. Y.) 249. See §§ 565, 621.

[12] Threlfal *v.* Giles, cited 2 M. & Rob. 492; Sadler *v.* Belcher, *id.*, 489.

[13] *Ex parte* Clutton, 1 Fonb. 167.

[14] Bank of United States *v.* Bank of Georgia, 10 Wheat. 333, 6 L. ed. 334; Corbit *v.* Bank of Smyrna, 2 Harr. (Del.) 235; Gloucester Bank *v.* Salem Bank, 17 Mass. 33; Jones *v.* Ryde, 5 Taunt. 488; 1 Com. Law 166; Markle *v.* Hatfield, 2 Johns. (N. Y.) 455; Young *v.* Adams, 6 Mass. 182; Wilson *v.* Foree, 6 Johns. (N. Y.) 110.

Forged Bills of the Depositor

If a bank receives its own pretended bills, it cannot object after it has allowed several days to go by, for it should know its own bills.[15] This, however, is not in accord with the best views on this subject, unless it be added that its failure to discover the forgery is through negligence, and that correction of the error would leave the depositor in a worse position than if the bills had been refused. A forged promise is no promise, it lacks the consent necessary to a contract; receiving it without knowing the facts cannot be a ratification, and the only other ground of holding the bank is neglect and damage.

Bills of Insolvent Bank. Fraud of Depositor

If bills of another bank are received on deposit, and it turns out that that bank is insolvent, the best view is that the loss must fall on the bank, whether the insolvency be before or after depositing the bills.[15a]

Any fraud or concealment on the part of the depositor will throw the loss on him in any of these cases.

(*e*) **Suits by Depositor.** — Though the items on general deposit constitute a running account, yet it is not of such a nature that a bill in equity for an accounting will lie. At any time the simple striking of a balance between the two columns of debits and credits will show a sum which is a simple debt; so that there is in fact no ground on which an accounting can be demanded in equity. An ordinary action of debt will lie on behalf of the depositor, and if the bank answer payment or discharge, it is matter of common law, where the remedy for either party is perfect. Neither, as has been stated, is there a fiduciary relation of any nature whatsoever between the parties which could justify recourse to equity. Suit will lie on the common money counts. This has been conclusively settled by the sound decision given by the House of Lords in the case of Foley *v.* Hill.[16]

It has been said that the bank is debtor to the depositor for the balance of his deposit account. But though the relationship between the bank and the depositor is in nearly all respects that of

[15] Bank of the United States *v.* Bank of Georgia, 10 Wheat. 338, 6 L. ed. 334. See §§ 633, 659.

[15a] See §§ 633, 662.

simple debtor and creditor, yet the usages of the banking business have introduced certain special rules. For example, the usage of banks to make payments only in response to checks, drafts, or notes made payable at the bank of the promisor, has given rise to the rule that ordinarily an action cannot be maintained by a depositor against a bank to recover the amount of his deposit until a formal demand has been made. The bringing an action does not amount to a demand in such cases.[17] (§ 322.)

But if it appears that demand would have been useless, as where the bank denies that there ever was a deposit, suit may be brought without prior demand.[18]

§ 290. **Deposit Tickets, Pass-Books, Bank-Books, and their Effect.** — Summary: Mistakes in bank accounts are common, by charging unreal payments, or excessive payments, or omitting proper credits, or incorrect figuring, and the writing up of a bank-book or return of vouchers does not preclude inquiry into the correctness of the account rendered.[1]

A bank-book is *prima facie* evidence, but no more,[2] and is open to explanation by parol evidence, or it is not a contract.[2] As between the bank and its depositor, the entry of debits in the pass-book and striking a balance are a statement of account, and the delivery of the book to the depositor and its retention by him without objection make it a stated account,[2a] and a retention for many months and drawing out the exact balance shown on the book afford clear evidence of a settled as well as a stated account, and *prima facie* establishes the accuracy of the items.[3]

If the depositor acts on faith of the account in a manner he would not have done but for faith in its correctness, the bank is bound,[4] or if the depositor neglects to make such examination as a prudent man would make of his accounts, and the bank, acting in

[16] 2 H. L. Cas. 28.

[17] Chemical National Bank *v.* Bailey, 12 Blatchf. 480; Payne *v.* Gardner, 29 N. Y. 146.

But in McKnight *v.* Bank of Acadia, 114 La. 289, 38 So. 172 (1905), it is said that a suit is a judicial demand for the money due plaintiff on deposit account.

[18] Miller *v.* Bank, 172 Pa. 197, 33 Atl. 684.

[1] § 290. First National Bank *v.* Whitman, 94 U. S. 346, 24 L. ed. 229; Mechanics' Bank *v.* Earp, 4 Rawle (Pa.) 384; Bucklin *v.* Chapin, 1 Lans. (N. Y.) 443; Follansbee *v.* Parker, 70 Ill. 11; Bullock *v.* Boyd, 2 Edw. Ch. (N. Y.) 293; Bruen *v.* Hone, 2 Barb. (N. Y.) 586; Schneider *v.* Irving Bank, 1 Daly (N. Y.) 500; French *v.* Eastern Trust and Banking Co., 91 Me. 485, 40 Atl. 327 (1898); Lieber *v.* Fourth National Bank, 137 Mo. App. 158, 117 S. W. 672 (1909).

good faith or omitting to act by reason of his silence, puts itself in such position that correction would injure it, the depositor is bound.[5]

Pass-Book not Negotiable

A pass-book or other book of account is not negotiable, and cannot be rendered so by any agreement of the parties that the balance shall be payable " to order." [6]

An assignment of a deposit slip is not an assignment of the debt acknowledged thereby.[6a]

A deposit ticket may be controlled by parol. It is not a contract,

[2] Featherston *v.* Norris, 7 S. C. 472; s. c. 14 S. C. 624; State *ex rel.* Van Wyck *v.* Norris, 15 S. C. 241; Union Bank *v.* Knapp, 3 Pick. (Mass.) 96; Davis *v.* Lenawee County Savings Bank, 53 Mich. 163, 18 N. W. 629; Talcott *v.* National Bank, 53 Kan. 480, 36 Pac. 1066 (1894); Marine Bank *v.* Stirling, 115 Md. 90, 80 Atl. 736 (1911); First National Bank *v.* Peck, 180 Ind. 649, 103 N. E. 643 (1913); Boyd's Ex's *v.* First National Bank, 128 Ky. 468, 108 S. W. 360 (1908); Corbin Banking Co. *v.* Bryant, 151 Ky. 194, 151 S. W. 393 (1912); Quattrochi Bros. *v.* Farmers' etc. Bank, 89 Mo. App. 500 (1901); Lucks *v.* Northwestern Sav. Bank, 148 Mo. App. 376, 128 S. W. 19 (1910).

[2a] Nodine *v.* First National Bank, 41 Or. 386, 68 Pac. 1109 (1902); Pospisil *v.* Hajicek, 190 Ill. App. 638 (1914).

The rule that when an account is rendered its retention for a long time without objection becomes an account stated does not, as a general proposition, apply between banker and customer. As between them some superior equity would have to intervene to preclude the customer from objecting to illegal items charged against him. McGraw *v.* Traders' National Bank, 64 W. Va. 509, 63 S. E. 398 (1908).

[3] Clark *v.* National Bank of City of New York, 11 Daly (N. Y.) 239; Shipman *et al. v.* Bank, 126 N. Y. 318, 27 N. E. 371; Corbin Banking Co. *v.* Bryant, 151 Ky. 194, 151 S. W. 393 (1912); Pospisil *v.* Hajicek, 190 Ill. App. 638 (1914); Kenneth Inv. Co. *v.* National Bank, 96 Mo. App. 125, 70 S. W. 173 (1902).

[4] Skyring *v.* Greenwood, 4 Barn. & Cr. 281; Heane *v.* Rogers, 9 Barn. & Cr. 577; Hume *v.* Bolland, 1 C. & M. 130.

[5] Dana *v.* National Bank, 132 Mass. 156; Leather Manufacturers' Bank *v.* Morgan, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. 657; Scanlon-Gipson Lumber Co. *v.* Germania Bank, 90 Minn. 478, 97 N. W. 380 (1903); Brown *v.* Lynchville National Bank, 109 Va. 530, 64 S. E. 950 (1909); National Dredging Co. *v.* Farmers' etc. Bank, 6 Penn. (Del.) 580, 69 Atl. 607, 130 Am. St. Rep. 158, 16 L. R. A. (N. S.) 593 (1908); New York Produce Exch. Bank *v.* Houston, 169 Fed. 785 (1909); National Bank of Commerce *v.* Tacoma Mills, 182 Fed. 1 (1910). See Jordan Marsh Co. *v.* National Shawmut Bank, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250 (1909); Stallo *v.* Wagner, 220 Fed. 360 (1914).

[6] Witte *v.* Vincenot, 43 Cal. 325; Stewart *v.* State, 42 Tex. 242; Bayer *v.* Commonwealth Trust Co., 144 Mo. App. 676 (1910).

[6a] First National Bank *v.* Clark, 134 N. Y. 368, 32 N. E. 38.

but a memorandum or "note to help the memory." [7] It is *prima facie* evidence of the bank's liability though the deposit is not credited on its books.[8]

When a depositor by mistake makes out the deposit slip in the name of another the bank is justified in giving credit to the customer whose name is on the slip and the depositor cannot recover the amount from the bank even though it was entered in his pass-book.[9]

§ 291. **Bank-Books, or Pass-Books.** — Expanded statement: The custom is probably universal in this country for every depositor with a bank to have his bank-book, so called. In England the same thing is called a "passage-book" or "pass-book." It is hardly necessary to describe anything so familiarly known. Instead of this book, private bankers sometimes give simple receipts; or, more frequently, only render to their customers, from time to time, balanced accounts.

Balance and Voucher — Account Stated

(*a*) Ordinarily, whenever a deposit is made, the bank-book is presented at the bank counter for the purpose of having the amount and date of the deposit contemporaneously entered therein by the bank clerk or teller. At intervals, also, it is sent into the bank to be balanced by the proper officer; after which it is returned to the depositor, customarily accompanied by all his checks which have been paid by the bank since the date of the next preceding balancing. It will be seen that the chief value of the book is that the depositor may have a species of check upon the bank, and may use it as evidence upon the occurrence of any dispute and lawsuit. The entries in the bank-book, made by the proper officer, bind the bank as admissions.[0] Especially the balancing of the book is conclusive upon the bank, in the same manner as an account stated.[0a]

[7] Weisinger *v.* Bank, 10 Lea (Tenn.), 330; First National Bank *v.* City National Bank, 102 Mo. App. 357, 76 S. W. 489 (1903).

A deposit slip is a mere acknowledgment by the bank that the amount named has been received, and does not purport to embody the contract between the parties and cannot affect the rights of parties under an agreement. Fort *v.* First National Bank, 82 S. C. 427, 64 S. E. 405 (1908).

[8] American National Bank *v.* Presnall, 58 Kan. 69, 48 Pac. 556 (1897).

[9] Schwartz *v.* State Bank, 135 App. Div. 42 (1909), 119 N. Y. S. 763.

Entries are only Receipts — Prima Facie Evidence against Bank

(*b*) But the entry of credit for a deposit is held to be an original entry only on the supposition that, as in the ordinary course of business above described, the book accompanied the deposit, and the entry was made by the teller simultaneously with the receipt of the money, and as part of the same transaction. For if the book was sent to be written up afterwards from the books or memoranda in possession of the bank, the entries are not original, and may be examined into.[1] But the entry of the credit is, after all, only a receipt. It is *prima facie* evidence against the bank, and binds it like any other form of acknowledgment or receipt.[2] But apparently it binds no more; and as a receipt it is open to explanation by evidence *aliunde*. So that, if the bank succeeds in showing clearly that the entry is a mistake, it will no longer be binding.[3] If the correctness or incorrectness of the entry be disputed between the customer and the bank, a question of fact is thereby made for the jury.[4]

A deposit is deemed to be made at the time it is credited in the pass-book by the cashier, although not entered on the books of the corporation until some days later.[4a]

Also as against Depositor, and can be Controlled by Parol

(*c*) But the most difficult questions arise in considering to what extent the bank-book can be regarded as binding upon the depositor. In the simple case of an erroneous entry by the receiving teller, of course the customer may insist upon correction. Even where, when making his deposit, he also hands in with it the ordinary memorandum stating what sums he is depositing, and the receiving teller's entry corresponds with this memorandum, he may afterward be allowed to show that both his memorandum and

[0] § 291. Wasson *v.* Lamb, 120 Ind. 515, 22 N. E. 729; Arnold *v.* Hart, 176 Ill. 442, 52 N. E. 936 (1898); Second National Bank *v.* Gibboney, 43 Ind. App. 492, 87 N. E. 1064 (1908).

But the entry cannot be regarded as an admission when the bank cancels the entry on first detecting it, claiming it to be erroneous. Lucks *v.* Northwestern Sav. Bank, 148 Mo. App. 376, 128 S. W. 19 (1910).

The entry is in the nature of a receipt. Quattrochi Bros. *v.* Farmers' etc. Bank, 89 Mo. App. 500 (1901).

[0a] A balance struck in a pass-book is in effect an account stated which may be impeached for fraud or error. Greenhalge Co. *v.* Farmers' National Bank, 226 Pa. St. 184, 75 Atl. 260 (1910).

[1] Manhattan Co. *v.* Lydig, 4 Johns. (N. Y.) 377.

the entry were wrong, and gave him credit for too small a sum. For the bank is in fact liable for precisely the amount of money it receives. It is the act of receiving which by itself creates and perfects the debt, and which alone need be shown. The receipt therefore is open to correction in favor of the depositor, if it be erroneous. The actual fact of the real deposit is alone absolutely conclusive.[4b]

No By-Law can Subtract from this Right

(*d*) This rule of law is rigid, and can only be dispensed with by the express agreement of the parties. It cannot be infringed or modified by reason of any orders or by-laws of the bank.[5] When, however, the book has been balanced by the bank officer, has been returned to the depositor together with his checks, and has been retained by him for any length of time without objection, the matter becomes less clear upon principle, and the decisions are, perhaps, not wholly harmonious. The object which the bank declares itself to have in view is to put the depositor in the way promptly to discover and demand correction of any mistake existing in its account with him.

Acquiescence in Account Stated

(*e*) Accordingly, it has been held in England that the silence of the customer for a reasonable time after receiving back his books and checks would be deemed an admission on his part of the correctness of the balance.[6] It is not that his right to have the book amended to agree with the fact has been modified; but that he has lost that right altogether by reason of his own laches in failing to demand the amendment earlier.[6a]

[2] Union Bank *v.* Knapp, 3 Pick. (Mass.) 96; Commercial Bank of Scotland *v.* Rhind, 1 Macq. H. L. Cas. 643; Shaw *v.* Dartnell, 6 Barn. & C. 57; Quattrochi Bros. *v.* Farmers' etc. Bank, 89 Mo. App. 500 (1901); Landa *v.* Traders' Bank, 118 Mo. App. 356, 94 S. W. 770 (1906).

[3] Shaw *v.* Picton, 4 Barn. & C. 715; French *v.* Eastern Trust and Banking Co., 91 Me. 485 (1898).

[4] Snead *v.* Williams, 9 L. T. N. S. Exch. 115; Bank of Lawrenceville *v.* Rockmore, 129 Ga. 582, 59 S. E. 291 (1907).

[4a] Wasson *v.* Lamb, 120 Ind. 514, 22 N. E. 729.

[4b] The depositor is not bound to examine his pass-book to discover whether the cashier has blundered in counting the money deposited, since in such case the loss to the bank is the direct result of its own gross neglect which can in no case act as an estoppel on the depositor. Kemble *v.* National Bank, 94 App. Div. 544 (1904), 88 N. Y. S. 246, affirmed in Kemble *v.* Rondout National Bank, 183 N. Y. 545, 76 N. E. 1098 (1905).

And where a depositor receives an account stated from a bank and acquiesces in its correctness for six years, he loses his right to object that a check charged to him was charged by mistake.[6a]

Balance Conclusive after Six Years. Silence of Depositor Casts the Burden of Proof upon Him

In Union Bank *v.* Knapp, *supra*, the bank-book was said to be a transcript of the books of the bank, and so, if not objected to, to operate as a mutual acknowledgment of the parties as to their money dealings. But the construction which this remark ought to receive from the circumstances of the case, and the course of reasoning adopted by the court, both go to show that the judges did not mean to adopt the English rule. The case really arose and was decided under the Statute of Limitations. They say that the balance struck goes into the new account as a single item, and as such is taken out of the statute; but that it is taken out as a solid amount; that the several items going to make it up are not taken out of the statute and cannot be inquired into. Since the court thus takes the pains to say that the items shall not be looked into after six years from the date of the balancing, which must *then* be regarded as conclusive, it must be inferred that they do not mean to regard the book or the balancing as a *conclusive* " mutual acknowledgment " of the items at times prior to the lapse of that period. In Watson *v.* Phœnix Bank,[7] the depositor's bank-book was said to be no better evidence than the books of the bank. That is to say, it is a mere account drawn up by bank officers and not reinforced by a presumption of correctness growing out of its possession by the depositor. The best rule, as it is the most just, seems to be the one laid down in the New York cases. In Weisser *v.* Denison,[8] the ruling was substantially, that, if the depositor [8a] had not examined and objected to the account stated in his book within a reasonable time after it had been balanced and returned to him with the checks, his silence could at most only be *prima facie* evidence against him, and would throw the burden of proof

[5] Mechanics & Farmers' Bank *v.* Smith, 19 Johns. (N. Y.) 115.

[6] Devaynes *v.* Noble, 1 Mer. 541. But see Kepitigalla Rubber Estate *v.* National Bank (1909) 2 K. B. 1010. What constitutes a reasonable time is a question of law for the court. Nodine *v.* First National Bank, 41 Or. 386, 68 Pac. 1109 (1902).

[6a] National Bank of Commerce *v.* Takoma Mills, 182 Fed. 1 (1910).

[6a] Penn Bank's Estate, 152 Pa. St. 65, 25 Atl. 310.

upon him, instead of leaving it, where it would otherwise rest, with the bank, to prove its payments.

In Case of Forgery, the Depositor is now Held to Ordinary Care and Diligence in Making Examination. §§ *461, 470–473*

(*f*) So the depositor was allowed to show that certain checks charged against him in the account were forgeries, though a considerable time had elapsed since he received back his book. Johnson, J. said, that, in contemplation of law the book was balanced and the checks returned to him for his protection, not for that of the bank. This law certainly bears hardly upon the bank, which, in performing the task of writing up the book and in returning the checks, which are its own sole vouchers for the payments made by it on the depositor's account, has its own protection from precisely these tardy disputes partially in view, as it may reasonably expect that any ordinarily careful man will not long delay to see that the balance is correct, and that the checks returned and purporting to be his are in fact genuine. The language used by one of the judges intimates that if in the interval the bank had suffered any injury, which it might have escaped or avoided had it received correction in due season from its depositor, then the rights of the parties might be affected by this fact also. This last-named case has been cited with approval, and followed, in Illinois. A depositor's clerk drew checks, wrongfully signing the depositor's name, which were all duly honored by the bank. The process was continued several months, during which time the bank-book was several times written up, returned to the depositor, and by him sent back to the bank to be again written up, as in the ordinary course of business. He meantime did not detect the fraud for about six months, apparently because he intrusted the comparing of the bank-book to this same clerk. The court said that these

[7] 8 Met. (Mass.) 217.

[8] 10 N. Y. 68. See also Shipman *et al. v.* Bank, 126 N. Y. 318, 27 N. E. 371; First National Bank *v.* Peck, 180 Ind. 649, 103 N. E. 643 (1913); Merchants' National Bank *v.* Nichols, 223 Ill. 41, 79 N. E. 38, 7 L. R. A. (N. S.) 752 (1906); Rettig *v.* Southern Ill. National Bank, 147 Ill. App. 193 (1909); Kenneth Inv. Co. *v.* National Bank, 96 Mo. App. 125, 70 S. W. 173 (1902); Lieber *v.* Fourth National Bank, 137 Ill. App. 158 (1909).

[8a] The examination may be entrusted to one's agent or clerk. Merchants National Bank *v.* Nichols, 223 Ill. 41, 79 N. E. 38, 7 L. R. A. (N. S.) 752, (1906).

facts did not conclude him as against the bank; that the writing up the pass-book and returning the checks were for the protection of the depositor, not of the bank; and the depositor's failure to examine them was not such negligence as to exonerate the bank from liability to make good to him the amount of checks improperly paid and charged to him.[9]

In Manhattan Co. *v.* Lydig,[10] it was said that, though the depositor should not be allowed to open the whole account, yet after the lapse of only a moderate time without objection by him he might still be allowed to falsify certain particular items. Whether this right ought to be allowed to exist for so long a time as the six years of the Statute of Limitations may well be questioned. Probably such time as the courts should consider reasonable, upon consideration of the nature, course, and amount of the dealings between the parties, would be held conclusive against the depositor. For after he has passed many successive balancings, for many months or years, having meantime had multitudinous transactions with the bank, it might fairly be deemed an unreasonable hardship if he could still be allowed to go back and litigate to correct an error which he has so long had the means of correcting, and which the bank might justly presume that any ordinarily careful person could not fail to have corrected long since.

The weight of reason and authority is now strongly in favor of the rule that the depositor must answer to the bank, under the general principles of estoppel and responsibility for loss caused by negligence, for any damage resulting to the bank by reason of its having acted or omitted to act upon faith of the depositor's silence, when he might have discovered the fraud, forgery, or mistake by reasonable care in examining his accounts with the bank. (§§ 470–473.)

§ 292. **Silence may estop the Depositor as to Charges and Commissions of the Bank.** — A different description of case is where there is no claim to correct a mistake in the bank-book, but use is sought to be made of it in order to conclude the depositor as to a course of dealing, or an implied agreement between himself and the bank. The extent to which the book may be used for this

[9] Manufacturers' National Bank *v.* Barnes, 65 Ill. 69; Merchants' National Bank *v.* Nichols, 223 Ill. 41, 79 N. E. 38, 7 L. R. A. (N. S.) 752 (1906), affirming 123 Ill. App. 430 (1905).

When the forgery is discovered it is the duty of the depositor to promptly notify the bank thereof. McNeely *v.* Bank of North America, 221 Pa. St. 588, 70 Atl. 891, 20 L. R. A. (N. S.) 79, n. (1908).

[10] 4 Johns. (N. Y.) 377.

purpose is illustrated by the following case. A depositor had largely overdrawn his account, and the banker in writing up the bank-book at the end of a period of six months had made certain charges in the way of interest and commissions for his advances, and had explained the same to the agent of the depositor (the depositor himself being too ill to attend to his affairs). It was held that the lapse of several months, without complaint made on behalf of the depositor, was conclusive evidence of his acquiescence in the charges made. But it was also held that it was no evidence of his acquiescence, or agreement to acquiesce, in similar charges continued thereafterward during an ensuing period of six months.[1]

§ 293. **Bank-book not conclusive as to Title to the Deposit.** — It has been held in England, that the name in the bank-book is not conclusive as to the person with whom the bank contracted. If money be deposited by A. in his own name, B. may recover from the bank by showing that the deposit was in fact made upon his account, — that he was the principal and the real lender, creditor, or depositor. But the evidence to this effect must be very clear and explicit.[1] See § 565.

§ 294. **Right to inspect Books and inquire into Account.** — It has been said that "*on all proper occasions*" a depositor has a right to inspect the books of the bank,[0] and that for this purpose the officers having charge of the books [1] are agents of both parties. What would be regarded as "proper occasions" was not intimated; and certainly such a request, made without notice by the depositor or invitation by the bank, would not improperly be regarded by the bank officers as an unwarrantable intermeddling. The depositor not being in any respect responsible for the conduct of the affairs of the bank, not being a stockholder therein, or not applying to examine in that character, might reasonably be refused an inspection of all its private affairs. It must be supposed that the right to examine, if fully considered and passed upon, would be

[1] § 292. Williamson *v.* Williamson, L. R. 7 Eq. 542; and see Mosse *v.* Salt, 32 Beav. 269.

[1] § 293. Sims *v.* Bond, 5 Barn. & Ad. 389.

[0] § 294. When a banker makes an assignment for the benefit of creditors the bank books should not be sold since they are the evidence of the assets of the trust estate which belong alike to all the creditors and which should be preserved for their inspection upon proper application and at a proper time. Andrew *v.* Wilson's Assignee, 114 Ky. 671, 71 S. W. 890 (1903).

[1] Union Bank *v.* Knapp, 3 Pick. (Mass.) 96; Watson *v.* Phœnix Bank, 8 Met. (Mass.) 217.

confined to such portions of the books as relate to the accounts and dealings of the bank with the individual applicant; also that the "proper occasions" would be very narrowly defined. If the depositor has reason to think that there is an error in his account, as shown on the bank-book, he may reasonably demand an inspection at the first convenient hour; but the reason of the privilege, and doubtless the privilege accordingly, should be confined to such an examination only as would suffice to prove or refute the suspicion of error, and could not extend to the accounts of other customers or to the general business of the institution. It might be highly injurious to the welfare of the corporation and to the interests of all concerned to have its condition and affairs subject to inspection, and therefore to publication and gossip. Indeed, the bank might be committing a positive wrong, for which it might be held to answer in damages, if it should allow one person to examine the accounts of others.

(*a*) **When Bank may reveal the State of a Customer's Account to Another.** — It has been laid down that a banker has no right to reveal the state of his account with his customers.[2] Though in the case cited it has also been doubted whether an action for damages can be maintained by the customer against the banker unless specific injury can be shown. But this case is a very unsatisfactory precedent, since in it the question whether or not the relation between banker and customer created this duty of secrecy on the part of the former concerning the balance of the latter appears, for some unaccountable cause, to have been left to the decision of the jury. They found that the relationship did create such a duty, and the court allowed their finding to remain undisturbed. In another English case it has been held that, where a check is presented, and the banker has funds of the drawer, but not sufficient to meet this check, the banker has no right to disclose to the holder of the check the amount of such deficiency, and so to enable the holder to pay in the balance to the drawer's credit and then procure the check to be paid.[3]

It may be very proper to deny the general right of a banker to disclose the state of an account to satisfy an inquiry, to the possible great disadvantage of his customer (as, if the latter were thought to be embarrassed and his account overdrawn, his credit might be damaged by the appearance of his account, though a

[2] Hardy *v.* Veasey, 3 L. R. Ex. 107.
[3] Foster *v.* Bank of London, 3 F. & F. 214.

fuller statement of his arrangements with the bank would wear a different aspect).

It is no part of the business of a bank to constitute itself a bureau of information, or headquarters for reporters and gossips. But the case of a check-holder when the funds are insufficient seems very different; he has a right to whatever unincumbered funds of the drawer are in the hands of the bank, a right superior to any right of the depositor, and if the disclosure in such case be a harm to the depositor it is his own fault alone, for he drew the check and authorized the inquiry. One to whom the depositor has passed his interest in the deposit should have the same right to know its conditions as the depositor possessed. As to the depositor, there can be no doubt that the bank should state the amount on hand, and give the holder an opportunity to decide what course he will pursue; and though the strict contract of the bank with the depositor may perhaps be only to pay if it has sufficient funds, it is a public institution, receiving valuable franchises from the State, and owes in return a duty to the public to conduct its business in such a manner as not to cause damage to those who have dealings with it, by refusal to do so simple and costless an act as to state the true condition of the deposit against which a check is drawn. Indeed, it seems clear to us that the duty of the bank can be placed on firmer ground. It would have no right to say to a depositor inquiring as to his account, with a check in his hand, "We agreed to pay your checks, if the funds were sufficient; but your check is too large, and we will have nothing to do with it, nor inform you of the true amount." Well, then when the depositor gives H. the check for value, he (substantially and according to the best opinion legally) transfers the whole deposit (if less than the check) to the holder (subject to his acceptance), and therefore the holder has the same right of inquiry of the bank and as against the bank as the depositor.

It is unquestionable that a banker summoned as a witness — *a fortiori* summoned as garnishee — must declare the balance of his customer at any given date. The fact or knowledge cannot be regarded as a "confidential communication." [4]

And if a general creditor has a right to know the state of the account in this way, when he inquires in the manner provided by law for making his demand upon the deposit, why has not such a special creditor as a check-holder an equal right, when he makes

his demand in the way provided by law for his kind of demand on the deposit, namely, presentment of his check?

A partner has a right to inspect the books of the partnership and where his co-partner is the president of a national bank and nearly its sole owner and the only account of the partnership transaction was kept on the books of the bank under the direction of its president the partner has a right to inspect so much of the books of the bank as relates to the partnership transaction, for the purpose of preparing his defence to a note.[5]

A stockholder has a right to inspect the books of the bank at a proper time and for proper purposes, but he has no right to examine them for speculative purposes, or to gratify idle curiosity or to aid a blackmailer.[6]

Note upon the Use of Bank-Books as Evidence

§ 295. The books of the bank are admissible in evidence on its behalf.[1] The reason, as laid down in a well-known Massachusetts case, is that depositors have a right "on all proper occasions" to inspect the books of the bank, and therefore the officers having charge of these books are the agents of both parties in this portion of their employment. Also, because the depositor's own bank-book is a transcript of the books of the bank, and in effect operates as a mutual acknowledgment between the parties as to their money dealings.[1] This line of reasoning will hardly commend itself as perfectly satisfactory. Practically speaking, the right of the depositor to examine the books of the bank must be exceedingly limited, and the "proper occasions" could hardly be supposed to occur often enough to make the book-keepers really, and in any reasonable sense of the phrase, the agents of the depositor. They are in no manner under his supervision, nor would it be possible for him daily to examine their entries,

[4] Loyd *v.* Freshfield, 2 Car. & P. 325; and see Forbes's Case, 41 L. J. Ch. 467.

A cashier may be committed for contempt if he refuses to testify as to the amount a customer has on deposit. *In re* Sanford, 236 Mo. 665, 139 S. W. 376 (1911).

A magistrate before whom criminal proceedings are being taken has power under the Bankers Books Evidence Act to make an order for the prosecutor to inspect the books of a bank and take copies of entries of defendant's account therein. Rex *v.* Kingborn (1908) 2 K. B. 949.

[5] Rush *v.* Browning, 103 Tex. 649, 132 S. W. 763.

[6] Guthrie *v.* Harkness, 199 U. S. 148, 50 L. ed. 130, 26 Sup. Ct. 4 (1905); Harkness *v.* Guthrie, 27 Utah 248, 75 Pac. 624, 107 Am. St. Rep. 576, n. (1904); Tuttle *v.* Iron National Bank, 170 N. Y. 9, 62 N. E. 761 (1902).

[1] § 295. Bagley *v.* Roberson, 57 Ga. 145; Union Bank *v.* Knapp, 3 Pick. (Mass.) 96; Watson *v.* Phœnix Bank, 8 Met. (Mass.) 217 (following and relying upon the preceding); Leonora National Bank *v.* Ragland's Adm'r, 128 Ky. 548, 108 S. W. 854 (1908); Blinn Lumber Co. *v.* McArthur, 150 Cal. 610, 89 Pac. 436, 10 L. R. A. (N. S.) 876 (1907).

even if the courts should hereafter feel able to assert the occasional right of examination above declared to exist, when that question shall be directly raised. Other authorities, though content to admit the books in evidence, yet lay down a doctrine contrary to that advanced in the Massachusetts opinion, and say that the depositor is *not bound* by the books of the bank, since the persons who keep those books *are in no sense* his agents, but are the employees of the bank only. It is true that the Massachusetts judges did not declare, and did not intend to declare, that the depositor would be absolutely concluded by the books of the bank; yet their reasoning was only a proper basis for this conclusion. The discussion of the comparative merits of the different courses is, however, rendered rather unprofitable by the fact that they lead to the same ultimate conclusion, and that this is too unquestionably sound to suffer from any criticism of the reasoning which has led up to it. Either directly or by implication, too many authorities combine to assert the admissibility of the books of the bank to leave the rule in any doubt.[2]

The entries in the books, when produced, must be verified and sworn to by the clerk who made them if possible.[2a] But if he is inaccessible, proof that the entries are in his handwriting will suffice.[3]

(*a*) *Proof of Entries.* So, too, the cashier of the bank is competent to prove the amount of a deposit in favor of the bank; certainly, if the bank releases him from any possible liability he may be under to it for any mistake or misconduct of his own in the matter; and perhaps so, even if the bank does not thus release him.[4]

But if the entry was actually made by a clerk, it is said that the clerk should be summoned in person; for though it is true that the cashier has, as a part of his official function, the charge of the books and the superintendence of the book-keeping, yet this does not necessarily imply that personal knowledge of particular entries which is necessary in order that they should be duly proved.[5] It is the actual maker of the daily entries

[2] Johnson *v.* Farmers' Bank, 1 Harr. (Del.) 117; Meighen *v.* Bank, 25 Pa. St. 288 (by implication; the books were introduced and the theory on which they were kept was allowed to be explained in that case); Town of Concord *v.* Concord Bank, 16 N. H. 26.

[2a] Pass-books of banks may be admitted in evidence without identification when they are admitted in an action of conversion merely to show the defendant's possession. Manning *v.* Maytubby, 42 Okla. 414, 141 Pac. 781 (1914).

When the books of a bank are introduced to show the state of the account between the bank and a customer, which was collateral to the main issue of whether the bank made fraudulent representations in respect to the solvency of the customer, they may be admitted upon proof of their identity by the cashier without calling the book-keeper who made the entries. Continental National Bank *v.* First National Bank, 108 Tenn. 374, 68 S. W. 497 (1902).

[3] Union Bank *v.* Knapp, 3 Pick. (Mass.) 96; Watson *v.* Phœnix Bank, 8 Met. (Mass.) 217; Johnson *v.* Farmers' Bank, 1 Harr. (Del.) 117; Leonora National Bank *v.* Ragland's Adm'r, 128 Ky. 548, 108 S. W. 854 (1908).

[4] Johnson *v.* Farmers' Bank, 1 Harr. (Del.) 117.

[5] Williams *v.* Kelsey, 6 Ga. 365. But see Continental National Bank *v.* First National Bank, 108 Tenn. 374, 68 S. W. 497 (1902); Schmidt *v.* Scanlon, 32 S. D. 608, 144 N. W. 128 (1913).

who is needed. An examined copy of the books is, by itself, inadmissible. But it has been said that perhaps, if supplemented by proof that the original entries were made by an officer of the bank, the officer himself swearing to this fact; or if this be impossible, his handwriting being proved, the copy might in a case of sufficient necessity be admitted.[6]

(*b*) *Depositor's Book.* The case of Watson *v.* Phœnix Bank, adopting the views above criticised, which were laid down in the preceding case of Union Bank *v.* Knapp, says that the depositor's bank-book is no better evidence than the books of the bank.[6a] Certainly, if the doctrine of the last-named case is correct, this is an unavoidable corollary. It has been stated that the depositor is under no such positive obligation to examine his bank-book, when returned to him after its posting by the bank, and to correct errors, that his failure promptly to demand a correction can be subsequently construed as an admission of correctness. Nevertheless, the fact that he has the opportunity offered him to do this, and that any man of ordinary prudence in the conduct of his affairs would do it, must raise a certain presumption of the accuracy of the entries in the bank-book stronger than any presumption which can reasonably arise in favor of the entries in the books of the bank; for these, whatever may be the legal right of the depositor to examine them, he in point of fact never does see.

(*c*) *More Probability of Mistake in the Bank's Books than in the Pass-Book.* Neither is it correct to say that the value of these two descriptions of entries is equal, on the theory advanced by the judge in Union Bank *v.* Knapp, that the bank-book is a "transcript" of the books of the bank; for this is not the truth. The noting of the checks drawn — that is, the depositor's debit account — is probably made, when the bank-book is posted, from the books of the bank; but the entries of deposits, which form the at least equally important credit side of his account, are made in most cases by the receiving teller when the bank-book and the deposit are offered to him together, and the book is at once returned. No contemporaneous entry is made on the books of the bank, and the credit does not appear upon them until at a later hour of the day it is *copied* on to them from the depositor's memorandum of his deposit, which he hands to the receiving teller, and which is checked as correct by that officer, and retained by him for the very purpose of subsequently making up or enabling the book-keeper to make up the entries in the books of the bank. There are, therefore, obviously much greater means for a mistake to creep into the books of the bank without observation, than for the same mistake to appear in the bank-book of the depositor without his observing it. Hence it follows that, if the bank-book of the depositor does operate as an acknowledgment between the parties (Union Bank *v.* Knapp), it is certainly entitled to greater consideration than the books of the bank, which could have the same operation only by virtue of a very questionable legal fiction.

(*d*) *New York has Held Pass-Book Conclusive on Bank. Usually only Prima Facie.* In New York it has been held that if the bank-book accompanies the deposit, and the credit is given in the book at the very time when the deposit is made, it then becomes an original entry, and is con-

[6] Philadelphia Bank *v.* Executors of Thos. Officer, 12 Serg. & R. (Pa.) 49; Ridgway *v.* Farmers' Bank, *id.*, 256.

[6a] The original pass-book of a bank customer containing the original entries of deposit is competent evidence of the facts disclosed by it. Security State Bank *v.* Fussell, 36 Okla. 527, 129 Pac. 746 (1913).

clusive upon the bank; though if the book were sent to be written up afterwards this would not be the case.[7] In Maine, it has been declared generally, that any credit in a bank-book may at any time be corrected by parol evidence, like any other receipt.[8] Clearly the credit entries in the bank-book are simply receipts, neither more nor less. There seems to be no reason why they should not be open to correction, equally with much more formal species of receipts, even though the deposit and the entry be contemporaneous.

The sound rule would seem to be that the depositor's bank-book, if it has been returned to him, and he has not within a reasonable time objected to it, should be regarded as *prima facie* evidence of the way the account stood between him and the bank at the date of the last balancing. It settles the presumption in the case, and leaves the *onus* on the party disputing it. If it agrees with the books of the bank, well and good; then there can be no use of discussing which of them is the better evidence, since both support the same state of facts. But if it is at variance with the books (unless an error in copying into it the entries of drafts drawn can be shown), the probabilities are that it is the more correct, especially if the credits have always been made at the time the deposits were paid in. These were contemporaneous entries, whereas the entries in the books were copies. The entries of debits or of checks drawn are copies from the books, and a mere error in copying ought to be easily shown and explained. Further, both parties have had access to the bank-book. The bank itself has made it up, and the depositor, unless he is an exceptionally careless man, has examined it, at least with sufficient care to see that the balance is correct. Every presumption arising from the actual course of dealing of the parties favors the correctness of the bank-book to the extent above asserted, that is, in respect to the last balancing, when the depositor has since that time had it in his hands long enough to make it natural to suppose that he has examined it. No equally strong presumptions arise in favor of the books of the bank. This is, however, strictly a mere presumption that is claimed in favor of the bank-book, which may of course be at any time refuted. The bank may show an error in the credits, which are its receipts, or an error or omission in the debits, which only purport to be a copy from its books, and are not an original instrument. The depositor is under no positive legal obligation to examine the book or to object to its accuracy within any specific time. Therefore, it is always open to him after any lapse of time to object to it, precisely as it is open to any person to object to the accuracy of an account rendered to him by one with whom he has financial dealings.

(*e*) *Entries Competent Evidence of the Nature of a Deposit.* An entry in a bank-book was as follows: "1861, Dec. 30th, cash (coin) $3000." The bank had at the time ceased to pay in specie, and when the depositor subsequently drew checks for this amount, payable in gold coin, the bank refused to pay in coin, and offered the "legal tender notes" of the United States government. The court held that this single entry was competent evidence for the plaintiff (in a suit to recover the gold coin or its equivalent in "legal tender notes") for the purpose of verifying the testimony of a witness concerning the circumstances of the deposit, and of showing the nature of the particular entry made by the bank officer at the time as indicative of the character of the deposit in question; also, that plaintiffs were not bound to put in evidence all the other entries in the book, but

[7] Manhattan Co. *v.* Lydig, 4 Johns. (N. Y.) 377.
[8] Lewis *v.* Eastern Bank, 32 Me. 9.

that it was sufficient if the book was placed in the power of the defendant to be used as evidence for any legitimate purpose; also that plaintiff might explain any ambiguity in the entry itself by evidence that by general and well known usage of the banks of that city an entry of this kind imported an agreement to return the deposit in kind, but that such usage could not be proved by showing a few particular instances.[9]

Parol evidence is admissible to explain an abbreviated or short entry in a bank-book, as being in the nature of a cipher or technical term.[10]

(*f*) *Absence of Record does not Conclude. Parol may be Used, even though Statute Requires a Record.* That a matter is of such a nature that it ought to appear, or might naturally be expected to appear, upon the records or the books of the bank, is no objection to a substantiation of it by parol testimony. This rule is not affected by the fact that the bank offers its books and records, in which no such matter appears. For there is no necessary legal obligation upon a bank, unless by virtue of express imperative legislation, to keep any record, or a thorough record, even of the formal votes of the board of directors. And though express legislation should in any case require such a record to be kept, yet the requisition would probably be only directory in its nature, and if neglected the vote would still remain equally valid, though unrecorded. So also authority, sanction, and ratification, though properly the subject of recorded corporate action, may all be based upon conclusive presumptions of law growing out of acts and dealings and other matters wholly independent of any proceedings appearing of record or capable of so appearing. If the party to the suit seeks to show facts and circumstances which either prove a vote or other corporate action to have been had, or which by legal implication raise in his favor a presumption of such vote or action, the effect of which presumption the law will not allow the corporation to evade by showing that no such vote or action was taken, he may do so by any means in his power. He cannot be shut off from his rights because the means of proving them are not furnished, as they ought to be, by the corporate records. Hence it is a sound rule that the absence from corporate records of notice of a fact, which if it existed ought to be stated there, is not conclusive of the non-existence of that fact, and does not preclude positive parol testimony offered to establish it.[11]

Where one is charged with having obtained goods by false pretences one may show the entries in his bank-book showing payments made by him for goods supplied to him, in order to prove that he was carrying on a *bona fide* business.[12]

Entries in a savings bank-book whose authenticity is not challenged are competent evidence that moneys were deposited as credited therein.[13]

A depositor is not entitled to an instruction that entries on the stub of his check book make a *prima facie* case of deposit, especially when such an instruction is not specifically requested.[14]

[9] Chesapeake Bank *v.* Swain, 29 Md. 483.

[10] Wingate *v.* Mechanics' Bank, 10 Barr (Pa.) 104.

[11] Concord *v.* Concord Bank, 16 N. H. 26; Edgerley *v.* Emerson, 3 Fost. (N. H.) 555.

[12] Rex *v.* Segar, (1914) 3 K. B. 1112.

[13] Miller *v.* Pierpont, 87 Conn. 406, 87 Atl. 785 (1913).

[14] Pate *v.* Snow Hill Banking Co., 162 N. C. 508, 77 S. E. 230 (1913).

CHAPTER XIX

CERTIFICATES OF DEPOSIT

§ 297. Form. § 51.
May vary from a simple receipt to a full express promise to pay, with words of negotiability.
§ 299. Signature. § 744.
Of the cashier is sufficient, though a statute requires the bank's
§ 297. contracts to be otherwise signed.
Nature and Effect.
A certificate of deposit bears a close resemblance to a promissory note on demand, and is by some courts held identical with such a note, so that suit may be brought upon it with-
§ 298. out demand, and the Statute of Limitations runs from date or delivery, whichever is latest. But the weight of reason and authority is to the effect that it is intended as a continuing security, and that the bank is not in default until demand is made, so that demand is necessary before a right of action can arise to set the statute running.
§ 298. If there are no words of promise in the instrument, they are implied, though a New York case holds that such a certificate is a simple receipt and not even a contract, but subject to control by evidence parol.
Negotiability. § 9, n. 9, § 374.
§ 299. A certificate is negotiable if it contains negotiable words, and is payable in money.
"Currency" and "current funds" are considered to mean money, though there are cases to the contrary.
§ 300. Transfer of Certificate.
By indorsement.
Without indorsement.
Statute of Limitations. § 321.
§ 301. Analysis.
§ 302. Staleness.
Thirty-one days does not make a certificate stale.
Six years has been held to do so.
§ 303. Seven years has been held not to do so.
Payment by (§§ 490, 637).
§ 304. A certificate of deposit is, like a check, presumed to be only conditional payment.
§ 305. But a collecting bank may take its own certificates in payment to the absolute discharge of the debtor, though the bank becomes insolvent before remitting to the creditor; the trans-

action is equivalent to payment of the certificate and repayment of the money to the bank. But if the taking is a fraud, by reason of the condition of the bank at the time of receiving the certificate as payment, the depositor will be
§ 305. preferred to the general creditors of the bank, he having ordered the bank to collect and remit.
§ 306. Lost Certificate. §§ 395 A, 649.
§ 307. Interest on Certificate. § 309.
§ 308. Alternate Certificate.
Where the deposit is payable to the order of S. or of E., his wife, if S. dies, E.'s power is revoked. This interpretation has been questioned.

§ 297. **Form.** — A certificate of deposit,[0] or the written acknowledgment of the bank that it has received from a certain person a certain sum [0a] on deposit, is an instrument occasionally issued.[0b] Chiefly it is given to persons not regular customers of the bank and not designing to become such, but who have for some reason, and on some isolated occasion, desired to leave a sum of money in the custody of the bank.[0c] Sometimes, though more rarely, a regular customer, having some special object to subserve, may desire such a certificate. In form they are substantially simple receipts of the bank, in negotiable form, for so many dollars, and so are only evidence of an indebtedness, like the bank-book.

An instrument saying, "Due A. A., trustee, $4,000, returnable on demand. It is understood that this sum is specially deposited with us and is distinct from the other transactions with said A. A.", — was held a certificate of deposit.[1]

So, "Received from L. $1,600 on deposit, in national currency", was held a certificate of deposit.[2]

[0] § 297. A deposit slip is used for the same purpose as a certificate of deposit, but it is more informal. It, however, is an evidence of debt and is the subject of forgery. State *v.* Jackson, 221 Mo. 478, 120 S. W. 66, 133 Am. St. Rep. 477 (1909).

[0a] A receiver of a savings bank, in an action upon a certificate of deposit issued by the bank, cannot affirm that the bank never received the money. State *v.* Corning State Sav. Bank, 136 Iowa 79, 113 N. W. 500 (1907).

[0b] Commercial banks have full power to issue certificates of deposit in the absence of statutory prohibition. Nor are their powers curtailed by a statutory provision expressly vesting similar powers in savings banks. Abbott *v.* Jack, 136 Cal. 510, 69 Pac. 257 (1902). See Kavanaugh *v.* American Bank, 239 Ill. 404, 88 N. E. 171 (1909).

[0c] The purpose and use of certificates of deposit is to transmit funds, and in this respect they are like certified checks. Pierce *v.* State Normal Bank, 215 Mass. 18, 101 N. E. 1060, 46 L. R. A. (N. S.) 693 (1913).

[1] Smiley *v.* Fry, 100 N. Y. 262, 3 N. E. 186.

[2] Long *v.* Straus, 107 Ind. 94, 6 N. E. 123, 7 N. E. 763.

The words "to be left six months" renders the instrument a "time", and not a "demand" certificate, maturing at the expiration of six months.[2a]

A certificate of deposit as follows: "This certifies that A. B. has deposited in this bank $3,000 payable to the order of self in current funds on return of this certificate properly indorsed; this deposit not subject to check; with interest at six per cent if left six months; no interest after six months", is overdue so as to charge purchasers with notice of equities after the expiration of six months, and not until then.[2b]

A certificate payable twelve months from date, but "payable in six months if desired", is due in twelve months. The privilege of payment at the end of six months is to be availed of, only at the election of the payee or his indorsee.[2c]

Signature

Ordinarily, the signature of the cashier to the certificate is sufficient. Though it is a contract in strict law, and though statutes often designate the manner in which "contracts" shall be signed, yet the phrase thus used in the statutes has, by sheer force of necessity and common sense, been construed by the courts not to apply to those instruments which by the daily course of business in all banking institutions the cashier alone is wont to execute, and among which the simple receipt and promise to repay, which constitute a certificate of deposit, are to be included.[3]

§ 298. **Nature and Effect.** — The practical ease with which the holder of such a receipt can transfer it for value received, or pledge it as security, has led to considerable litigation upon such instruments. They have been held to be in fact equivalent to promissory notes.[1] They create no trust relation between deposi-

[2a] Towle *v.* Starr, 67 Minn. 370, 69 N. W. 1098 (1897).

[2b] Kirkwood *v.* First National Bank, 40 Neb. 485, 58 N. W. 1016 (1894).

[2c] Citizens' Bank *v.* Jones, 121 Cal. 30, 53 Pac. 354 (1898).

[3] See the following cases: Curtis *v.* Leavitt, 15 N. Y. 19; Barnes *v.* Ontario Bank, 19 N. Y. 152; State Bank *v.* Kain, 1 Breese (Ill.) 45; State Bank *v.* Lock, 4 Dev. (N. C.) 533.

[1] § 298. Cate *v.* Patterson, 25 Mich. 191; Mills *v.* Barney, 22 Cal. 240; Curran *v.* Witter, 68 Wis. 16, 31 N. W. 705; Taylor *v.* Hutchinson, 145 Ala. 202, 40 So. 108 (1905); Lamar etc. Drug Co. *v.* First National Bank, 127 Ga. 448, 56 S. E. 486 (1907); First National Bank *v.* Stopf, 165 Ind. 162, 74 N. E. 987, 112 Am. St. Rep. 214 (1905); Krebs *v.* Blatz, 134 Ky. 505, 121 S. W. 436 (1909); Jensen *v.* Wilslef, 36 Nev. 37, 132 Pac. 16 (1913); Rinard *v.* Lasley, 143 Ill. App. 450 (1908); Bertolet *v.* Stoner, 164 Ill. App.

tor and the bank, but merely that of debtor and creditor.[1a] Usually they embody an express promise, in terms, to pay; but even if they do not, they are yet the bank's acknowledgment of its indebtedness, and so are of nearly the same effect as if they expressly promised payment. Substantially, therefore, they resemble promissory notes,[1b] and the courts have always inclined to regard them as such, especially when they are made payable otherwise than immediately and upon demand. But this is not a necessary feature.[2] If they are payable at a future day certain, they are simply promissory notes, neither more nor less. If a bank cannot issue its negotiable promissory note, neither can it issue a negotiable certificate of deposit of this description. If the note would be void, so likewise is the certificate.

If a bank cannot lawfully issue promissory notes, it cannot

605 (1911); *In re* Baldwin, 170 N. Y. 156, 63 N. E. 62, 58 L. R. A. 122 (1902); Hanna *v.* Manufacturers' Trust Co., 104 App. Div. 90 (1905) 93 N. Y. S. 304; Dickey *v.* Adler, 143 Mo. App. 326, 127 S. W. 593 (1910); Kushner *v.* Abbott, 156 Iowa 598, 137 N. W. 913 (1912); Kavanaugh *v.* American Bank, 239 Ill. 404, 88 N. E. 171 (1909); Forrest *v.* Safety Banking etc. Co., 174 Fed. 345 (1909).

But they represent transactions entirely different from those represented by promissory notes. Elliott *v.* Capital City State Bank, 128 Iowa 275, 103 N. W. 777, 111 Am. St. Rep. 198, 1 L. R. A. (N. S.) 1130, n.

[1a] Leaphart *v.* Bank, 45 S. C. 563, 23 S. E. 939 (1895), citing Forgarties and Stillman *v.* State Bank, 12 Rich. (S. C.) 518; Buckley *v.* Bank, 39 S. C. 291; Simmon *v.* Bank, 41 S. C. 188, 19 S. E. 502; Thomasson *v.* Bank, 45 S. C. 570, 23 S. E. 942 (1895), citing Leaphart *v.* Bank, *supra;* State *v.* Shove, 96 Wis. 1, 70 N. W. 312 (1897); Lamar *v.* Taylor, 141 Ga. 227, 80 S. E. 1085 (1913); State *v.* Corning State Sav. Bank, 136 Iowa 79, 113 N. W. 500 (1907).

Holders of such certificates are "depositors" within the meaning of the constitution of South Carolina making stockholders in banks liable to depositors. Wilkes *v.* Arthur, 91 S. C. 163, 74 S. E. 361 (1911). But in Alabama a holder of a certificate of deposit is not a "depositor" within the meaning of the constitutional provisions relating to preferred creditors. Taylor *v.* Hutchinson, 145 Ala. 202, 40 So. 108 (1905).

[1b] For many purposes certificates of deposit are treated as promissory notes. State *v.* Corning State Sav. Bank, 136 Iowa 79, 113 N. W. 500 (1914).

Where the certificate recites that the money is deposited to the credit of a third person, and no control over it is reserved to the depositor, it is equivalent to a promise by the bank to pay such third person upon the presentation of the certificate; and he may maintain an action against the bank for an unwarranted refusal to pay the money deposited to his credit. Lamar etc. Drug Co. *v.* First National Bank, 127 Ga. 448, 56 S. E. 486 (1906).

[2] Poorman *v.* Mills, 35 Cal. 118; Beardsley *v.* Webber, 104 Mich. 88, 62 N. W. 173.

issue certificates of deposit payable at a future day with interest, and their illegality affects all parties, however innocent.[3]

If, however, the bank is empowered to issue promissory notes subject only to the restriction that it shall issue none which are designed to pass into circulation as currency, but only such as become necessary in the ordinary course and conduct of its affairs, and are strictly business paper, then it may issue certificates of deposit, whether payable on demand or otherwise, subject only to the same restriction. By reason of the ease with which such instruments may be used for circulation, the courts have often been rigid in scrutinizing them, and applying the strict letter of the law to them; but they have never, that we have found, substantially modified or departed from the general principles above laid down.[4] If the certificate be in law a promissory note, the same rules as to indorsements in blank, the right of the holder to sue, grace, presentment,[4a] consideration,[4b] etc., which govern promissory notes, will also govern the certificate.[5]

[3] Bank of Peru *v.* Farnsworth, 18 Ill. 563; Bank of Orleans *v.* Merrill, 2 Hill (N. Y.) 295; Ontario Bank *v.* Schermerhorn, 10 Paige (N. Y.) 109; Bank of Chillicothe *v.* Dodge, 8 Barb. (N. Y.) 233.

[4] Curtis *v.* Leavitt, 15 N. Y. 19; Leavitt *v.* Palmer, 3 Comst. (N. Y.) 19; Barnes *v.* Ontario Bank, 19 N. Y. 152; Bank of Orleans *v.* Merrill, 2 Hill (N. Y.) 295; Southern Loan Co. *v.* Morris, 2 Barr (Pa.) 175; Craig *v.* State of Missouri, 4 Pet. 433, 7 L. ed. 911; Miller *v.* Austen, 13 How. 218, 14 L. ed. 119; Kilgore *v.* Bulkley, 14 Conn. 362; Laughlin *v.* Marshall, 19 Ill. 390; Bank of Peru *v.* Farnsworth, 18 *id.*, 563; Lindsey *v.* McClelland, 18 Wis. 481; White *v.* Franklin Bank, 22 Pick. (Mass.) 181; Bank of Chillicothe *v.* Dodge, 8 Barb. (N. Y.) 233; Bank Commissioners *v.* St. Lawrence Bank, 3 Seld. (N. Y.) 513; Cate *v.* Patterson, 25 Mich. 191; Pardee *v.* Fish, 60 N. Y. 265; Poorman *v.* Mills, 35 Cal. 118, and other Californian cases therein cited; Forrest *v.* Safety Banking etc. Co., 174 Fed. 345 (1909).

[4a] Towle *v.* Starr, 67 Minn. 370, 69 N. W. 1098 (1897).

[4b] If a bank issues to its stockholders certificates of deposit for the amount of reduction of capital stock when its assets are less than its liabilities they are without consideration as against a receiver and creditors of the bank, and if any money has been paid thereon it may be recovered by the receiver unless barred by the statute of limitations. State *v.* Bank of Ogalalla, 65 Neb. 20, 90 N. W. 961 (1902).

When certificates of deposit are issued as a loan to C., and not for bonds deposited by him as security for the loan for which certificates C. gives the bank his check, which is duly paid, they are valid in his hands, even though the bonds are worthless. Kavanaugh *v.* American Bank, 239 Ill. 404, 88 N. E. 171 (1909); Pryor *v.* Bank of America, 240 Ill. 100, 88 N. E. 288 (1909).

For a case of no consideration see Wood *v.* Green, 131 Tenn. 583, 175 S. W. 1139 (1915).

[5] Poorman *v.* Mills, 35 Cal. 118; Pardee *v.* Fish, 60 N. Y. 265; Miller

Certificate of Deposit not a Promissory Note Merely

Massachusetts distinguishes a certificate of deposit from a promissory note payable on demand, because the certificate states the deposit of a sum of money by the person to whom it is issued, and more especially because it is not payable until demand is made[5a] and the certificate is either returned or tendered.[5a] It says *also that they are designed to circulate as money*, like bills of the bank, and to be used for convenience and safety. Such a certificate is therefore said not to come within the language of the Massachusetts Revised Laws, c. 73, § 70, making a promissory note on demand in the hands of a third party subject to all the equities between the original parties.[6]

If there are no words of promise, the instrument is a simple receipt;[7] and in this case it was held that it was not a written contract within the rule excluding parol evidence to contradict or vary it.[7a]

But in Indiana this case has been severely criticised, as based on no authority, and as inconsistent with the holdings of many courts to the effect that a written order for property is a contract containing a promise to pay.[8] The law imports into the order a promise to pay, and no parol evidence of a previous or concurrent agreement can be admitted to vary it. It seems clear, however, that, unless there is in the instrument an undertaking to pay, it is not a promissory note.[9]

v. Austen, 13 How. 218, 14 L. ed. 119; Forrest *v.* Safety Banking etc. Co., 174 Fed. 345 (1909); Hanna *v.* Manufacturers' Trust Co., 104 App. Div. 90 (1905), 93 N. Y. S. 304.

[5a] The time within which demand must be made is the time limited for bringing an action; and a demand thirty-six years after the date of certificate is too late. Pierce *v.* State National Bank, 215 Mass. 18, 101 N. E. 1060 (1913).

[6] Shute *v.* Pacific National Bank, 136 Mass. 487; citing Bellows Falls Bank *v.* Rutland County Bank, 40 Vt. 377; Munger *v.* Albany County Bank, 85 N. Y. 580; Merchants' Bank *v.* State Bank, 10 Wall. 604, 19 L. ed. 1008.

[7] Hotchkiss *v.* Mosher, 48 N. Y. 482. But see State *v.* Corning State Sav. Bank, 136 Iowa 79, 113 N. W. 500 (1907).

[7a] State *v.* Corning State Sav. Bank, 136 Iowa 79, 113 N. W. 500 (1907).

[8] Long *v.* Straus, 107 Ind. 94, 6 N. E. 123, 7 N. E. 763; Garmire *v.* State, 104 Ind. 444, 4 N. E. 54; Anderson *v.* State, 65 Ala. 553; State *v.* Keeler, 80 N. C. 472; Commonwealth *v.* Fisher, 17 Mass. 46; United States *v.* Book, 2 Cranch (C. C.) 294; People *v.* Shaw, 5 Johns. (N. Y.) 236; State *v.* Morgan, 35 La. Ann. 293; Burke *v.* State, 66 Ga. 157.

[9] 1 Amer. L. Cas. 307.

A certificate of deposit is a subsisting chose in action and represents the fund it describes.[10]

§ 299. **Negotiability of Certificates of Deposit.** — A certificate of deposit may or may not be made negotiable. It may be made payable to A. B., when it is not negotiable.[0] It may be made payable to A. B. or order, when it is negotiable by indorsement. It may be made payable to A. B. or bearer, when it is negotiable by simple delivery.

Best View Holds it Negotiable

The best view is that a certificate of deposit is negotiable if it contains words of negotiability, as to A. B. or order, or to bearer,[1] though Pennsylvania does not agree to this, and a certificate bearing interest, and payable only to the order of the depositor on return of the certificate, was held to be only a special agreement to pay to any one presenting the certificate and depositor's order, and not a negotiable note;[2] and a holder taking by indorsement after attachment of the fund by a creditor of the depositor takes subject to the attachment.[3]

[10] Philpot *v.* Temple Banking Co., 3 Ga. App. 742, 60 S. E. 480 (1907).

[0] § 299. A certificate of deposit indorsed on its face "Deposit receipt, not transferable" is not negotiable. Bank of Montreal *v.* Clark, 108 Ill. App. 163 (1903).

[1] Miller *v.* Austen, 13 How. 218, 14 L. ed. 119; O'Neill *v.* Bradford, 1 Pinn. (Wis.) 390; 1 Parsons on Bills, 26; Frank *v.* Wessels, 64 N. Y. 155; Pardee *v.* Fish, 60 N. Y. 268; Bellows Falls Bank *v.* Rutland, 40 Vt. 377; Laughlin *v.* Marshall, 19 Ill. 390; Fultz *v.* Walters, 2 Mont. 165; Drake *v.* Markle, 21 Ind. 433; Tripp *v.* Curtenius, 36 Mich. 494 (1877); Bank of Peru *v.* Farnsworth, 18 Ill. 563; Lynch *v.* Goldsmith, 64 Ga. 42; Gregg *v.* Union Co. National Bank, 87 Ind. 238; National State Bank *v.* Ringel, 51 Ind. 393; Blood *v.* Northrup, 1 Kan. 28; Piner *v.* Clary, 17 B. Mon. (Ky.) 645; Talladega Ins. Co. *v.* Woodward, 44 Ala. 287; Fells Point Savings Institution *v.* Weedon, 18 Md. 528; Poorman *v.* Mills, 35 Cal. 118; Brummagim *v.* Tallant, 29 Cal. 503; Welton *v.* Adams & Co., 4 Cal. 37; Mills *v.* Barney, 22 Cal. 240; Howe *v.* Hartness, 11 Ohio St. 449; Bean *v.* Briggs, 1 Iowa 488; Forrest *v.* Safety Banking etc. Co., 174 Fed. 345 (1909); City Bank *v.* Bryan, 72 W. Va. 29, 78 S. E. 400 (1913); Kushner *v.* Abbott, 156 Iowa 598, 137 N. W. 913 (1912); Kavanaugh *v.* Bank of America, 239 Ill. 404, 88 N. E. 171 (1909); Hanna *v.* Manufacturers' Trust Co., 104 App. Div. 90 (1905), 93 N. Y. S. 304. See First National Bank *v.* Stopf, 165 Ind. 162, 74 N. E. 987, 112 Am. St. Rep. 214 (1905).

[2] Patterson *v.* Poindexter, 6 Watts & S. (Pa.) 227; Charnley *v.* Dallas, 8 Watts & S. (Pa.) 353; Gillespie *v.* Mather, 10 Pa. St. 28.

[3] Lebanon Bank *v.* Morgan, 28 Pa. St. 452.

"In Current Funds" or "Currency" Held not Negotiable

(*a*) It has been held that if it be expressed as payable "in currency", or "in current funds", or the like phraseology, it is not negotiable, because it is not made payable in money, but in that which at the time of payment may or may not be money. A tender in any of the circulating notes of the banks of the State would seem sufficient to satisfy the requirements of an instrument so worded; and courts will not consider current funds to be necessarily either money or equivalent to money.[4]

In Indiana,[5] Pennsylvania,[6] and North Carolina,[7] a certificate of deposit payable "in current funds" is not regarded as payable in "money", and is therefore not negotiable. But the better opinion is that "currency" or "current funds" means money and does not interfere with the negotiability of the certificate.

"Currency" Held to Mean Money

(*b*) "Currency" in a certificate of deposit means money, including bank notes, which, though not an absolute legal tender, are issued by authority of law, and are in actual and general circulation at par with coin. Such certificates are negotiable.[8]

"In Current Funds." Grace

(*c*) A certificate of deposit payable in current funds is negotiable.[9]

In an Iowa case a bank having for collection a certificate payable "in current funds" protested it without allowing grace, thereby discharging the indorser. There were in evidence two customs: (1) to regard current funds as meaning legal tenders and national bank notes, thereby making the certificate negotiable, and as it

[4] Ford *v.* Mitchell, 15 Wis. 304, and cases cited; Platt *v.* Sauk County Bank, 17 *id.*, 222; Lindsey *v.* McClelland, 18 *id.*, 481.

[5] National State Bank of Lafayette *v.* Ringel, 51 Ind. 393 (1875).

[6] McCormick *v.* Trotter, 10 Serg. & Rawle (Pa.) 94; Wharton *v.* Morris, 1 Dall. 125, 1 L. ed. 65.

[7] Johnson *v.* Henderson, 76 N. C. 227.

[8] Klauber *v.* Biggerstaff, 47 Wis. 551, 3 N. W. 357; Drake *v.* Markle, 21 Ind. 433.

[9] Citizens' National Bank *v.* Brown, 45 Ohio St. 39, 11 N. E. 799 (1887); Whiteman *v.* Childress, 6 Humph. (Tenn.) 303; Kirkpatrick *v.* McCullough, 3 Humph. (Tenn.) 171; Simpson *v.* Moulden, 3 Cold. (Tenn.) 429.

was payable one year after date, it was entitled to grace; (2) a local usage of the banks to regard such certificates as payable without grace. It was held that the bank was bound to know the law, but was not held to knowledge of the first usage, and that the second usage protected it from the charge of negligence brought by the holder.[10]

When in making out a certificate for a special deposit the teller by mistake makes it payable "in current funds" instead of "in certain notes", the bank is only liable to retire the notes constituting the special deposit.[11]

§ 300. **Transfer of Certificates.** — A certificate of deposit *prima facie* represents an undertaking on the part of the bank to pay the depositor on demand, and a transfer of the certificate will transfer all the rights possessed by the depositor against the bank in respect to the deposit.[1] It is an agreement to pay the holder of the certificate properly indorsed,[1a] and the bank is liable to a *bona fide* holder though it has already paid the deposit to the depositor.[2]

S., who owed P. $388, made a deposit of $388 intended for P.; by P.'s consent the deposit became his, with complete title by indorsement to him of the certificate of deposit.[3]

[10] Haddock *v.* Citizens' National Bank, 53 Iowa 542, 5 N. W. 766 (1880). See Mechanics' Bank *v.* Merchants' Bank, 6 Met. (Mass.) 13, where a usage of Boston banks to protest post notes without grace was admitted to protect a bank.

[11] Niblack *v.* Cosler, 80 Fed. 596 (1897).

[1] § 300. Miller *v.* Austen, 13 How. 228, 14 L. ed. 124; Kavanaugh *v.* Bank of America, 239 Ill. 404, 88 N. E. 171 (1909); Philpot *v.* Temple Banking Co., 3 Ga. App. 742, 60 S. E. 480 (1907).

But if the indorsement is void because in furtherance of a gambling transaction it is the duty of the bank which has been notified of such defence to interpose it when sued upon the certificate. Thomas *v.* First National Bank, 213 Ill. 261, 72 N. E. 801 (1904), affirming 116 Ill. App. 20 (1904).

Certificates may also be assigned. Forrest *v.* Safety Banking etc. Co., 174 Fed. 345 (1909); Dollar *v.* International Banking Corp., 13 Cal. App. 331, 109 Pac. 499 (1910).

[1a] Hanna *v.* Manufacturers' Trust Co., 104 App. Div. 90 (1905), 93 N. Y. S. 304.

If the certificate is not indorsed the payee thereof is *prima facie* entitled to its proceeds. Sommers *v.* Germania National Bank, 152 Wis. 210, 138 N. W. 713 (1912); Elliott *v.* Capital City State Bank, 149 Iowa 309, 128 N. W. 369 (1910).

[2] National Bank *v.* Washington County National Bank, 5 Hun (N. Y.) 605.

[3] Phillips *v.* Franciscus, 52 Mo. 370 (1873).

Ownership may Exist without Indorsement, though the Certificate is to Order

A third person may become the owner of, and have a right to demand payment upon, a certificate of deposit without indorsement, even though it be payable to order. As where H. deposited money of W., his wife, and took a certificate of deposit payable to H. or order, which he gave to W. without indorsing. W. demanded payment from the bank, notifying it of her right to the fund, and H. also claimed the money. It was held that the bank must pay W.[4]

§ 301. **Statute of Limitations.** (See § 321.) — Runs on a certificate of deposit, —

(1) From demand, according to the better opinion, it being intended to circulate as money, so far as to make it a continuing security, and the very nature and terms of the contract making the deposit payable only on demand, thus reversing the rule that applies to notes ordinarily, requiring the maker to seek out the creditor and pay him; and it may be added that, since the best authorities hold that a depositor cannot sue the bank for his deposit before demand (except in special cases), and that the statute only runs against the deposit from such demand, and since the certificate of deposit is only evidence of the contract which exists in every case of deposit, implied if not expressed, therefore it should be subject to the same rules. Merely writing down a contract does not change its nature. The bank is in no default until demand is made.

(2) To the contrary, there are some cases holding that the certificate is a promissory note, and subject, along with such notes, to the rule that no demand is necessary before suit, and that the statute runs from the date, or from the delivery (whichever is latest), of the instrument.

§ 302. **Certificates of Deposit and the Statute of Limitations.** *By First View Statute Runs from Date.* — A certificate of deposit is in legal effect a promissory note,[0] is due immediately, and no demand is necessary to set the Statute of Limitations running.[1]

[4] Cassidy *v.* First National Bank, 30 Minn. 86, 14 N. W. 363.

[0] § 302. Taylor *v.* Hutchinson, 145 Ala. 202, 40 So. 108 (1905).

[1] Mitchell *v.* Wilkins, 37 Minn. 335, 33 N. W. 910, following Cassidy *v.* Bank, 30 Minn. 87, 14 N. W. 363; Brummagim *v.* Tallant, 29 Cal. 503; Curran *v.* Witter, 68 Wis. 16, 31 N. W. 705 (1887); Meador *v.* Dollar

Second View Favored

(*a*) In the case cited from Michigan, the court thought that, as a certificate of deposit is a promissory note payable on demand, the principles governing such notes should be applied. It did not then perceive the effect of the facts that a certificate of deposit is meant to circulate as money, and is evidently intended to be a continuing security, etc.; but in a later case the Michigan court said that, if the question were open, it should decide with New York that a certificate of deposit did not become due till demand.[2]

The Two Views

(*b*) Where the certificate, as is not unfrequently the case, states that the amount is payable "on the return of this certificate", or on its presentment, or other such phrase, this language does not alter the legal effect of the instrument.[2a] As a promissory note, naming no place of payment, — for a heading with the name of the bank is not such a naming, — its maker, the bank, is bound to find it out and offer to pay it; and not till then can a return of it be claimed. Neither is the holder generally deemed to be under any obligation to present it for payment before suit upon it.[3] Though where a certificate was given to A., "payable to order of himself on presentation of this certificate properly indorsed", the court regarded this as so far like an ordinary deposit that A. could not sue the bank upon it without a previous demand.[4]

Savings Bank, 56 Ga. 605; Tripp *v.* Curtenius, 36 Mich. 494; Curran *v.* Witter, 68 Wis. 16, 31 N. W. 705; Mitchell *v.* Easton, 37 Minn. 335, 33 N. W. 910; Lusk *v.* Stoughton State Bank, 135 Wis. 311, 115 N. W. 813 (1908); Koelzer *v.* First National Bank, 125 Wis. 595, 104 N. W. 838, 110 Am. St. Rep. 870, 2 L. R. A. (N. S.) 885, n. (1905).

[2] Birch *v.* Fisher, 51 Mich. 39, 16 N. W. 220.

[2a] In Tobin *v.* McKinney, 15 S. D. 257, 88 N. W. 572, 91 Am. St. Rep. 694 (1901), the court holds that the date of maturity of such certificate is dependent upon its return to the bank, and the statute does not begin to run until payment is demanded. See also Tobin *v* McKinney, 14 S. D. 52, 84 N. W. 228, 91 Am. St. Rep. 688 (1900).

But a demand must be made within a reasonable time and notice of non-payment given, in order to hold indorsers. Anderson *v.* First National Bank, 144 Iowa 251, 122 N. W. 918, 138 Am. St. Rep. 288 (1909).

Commencement of an attachment suit and service upon the bank is equivalent to notice and demand for payment. Bank of Montreal *v.* Clark, 108 Ill. App. 163 (1903).

[3] Hunt *v.* Divine, 37 Ill. 137; Smilie *v.* Stevens, 39 Vt. 315, affirmed in Bellows Falls Bank *v.* Rutland County Bank, 40 *id.*, 377.

[4] Bellows Falls Bank *v.* Rutland County Bank, 40 *id.*, 377; Elliott *v.*

Second View, Statute Runs from Demand

(*c*) In Massachusetts it is said that a certificate of deposit is not like a promissory note on demand so far as concerns the Statute of Limitations, for upon such notes the statute runs from their date,[5] while a certificate is not due until demand, being intended to circulate as money.[6]

And in Pennsylvania the statute does not run until demand.[7] So it is in New York, Indiana, and Iowa. The very nature of the instrument shows that it represents money actually left with the bank to be retained until demanded.[8]

(*d*) It seems clearly reasonable that the Statute of Limitations should not be deemed to begin running until demand. The contract of the parties is to pay "on presentation of the certificate", and this changes by express agreement the ordinary rule that the debtor must seek the creditor and pay his debt, on which rests the rule that a debt can be sued for without demand. In

Capital City State Bank, 128 Iowa 275, 103 N. W. 777, 111 Am. St. Rep. 198, 1 L. R. A. (N. S.) 142, n. (1905).

[5] Field *v.* Nickerson, 13 Mass. 131.

[6] Shute *v.* Pacific National Bank, 136 Mass. 487.

In Iowa the same rule holds in regard to a demand certificate. But when payable at a fixed time they do not circulate and are like promissory notes so far as concerns the Statute of Limitations which begins to run at the time specified for the payment of the certificate. Thompson *v.* Farmers' State Bank, 159 Iowa 662, 140 N. W. 877, 44 L. R. A. (N. S.) 550 (1913).

But when a demand is not made until thirty-six years after the date of the certificate it is too late. Pierce *v.* State National Bank, 215 Mass. 18, 101 N. E. 1060, 46 L. R. A. (N. S.) 693 (1913).

[7] McGough *v.* Jamison, 107 Pa. St. 336 (1884). See Elliott *v.* Capital City State Bank, 149 Iowa 309, 128 N. W. 369 (1910).

If the bank which issues the certificate is a partnership and one of the partners dies after the certificate has matured demand upon his estate must be made within six years from the date of the death of the partner or the claim will be barred. *In re* Gardner's Estate, 228 Pa. St. 282, 77 Atl. 509, 29 L. R. A. (N. S.) 685, n. (1910).

[8] National Bank *v.* Washington County National Bank, 5 Hun (N. Y.) 607; Munger *v.* Albany City National Bank, 85 N. Y. 587; Boughton *v.* Flint, 74 N. Y. 476; Howell *v.* Adams, 68 N. Y. 314; Brown *v.* McElroy, 52 Ind. 404; Smiley *v.* Fry, 100 N. Y. 262, 3 N. E. 186; Elliott *v.* Capital City State Bank, 128 Iowa 275, 103 N. W. 777, 111 Am. St. Rep. 198, 1 L. R. A. (N. S.) 142, n. (1905); *In re* Cook, 86 App. Div. 586 (1903), 83 N. Y. S. 1009.

Since the depositor has the right to demand the amount due him at the time and the bank has the right to pay at any time, there can be no extension of the Statute of Limitation by either party, nor any laches on the part of either. Elliott *v.* Capital City State Bank, *supra.*

case of a certificate of deposit, or in any case where there is an agreement express or implied that the creditor shall seek the debtor, neither party is in fault until demand is made, and the statute should not run until then, although of course the creditor *may pay at any time*.[9]

§ 303. **When a Certificate of Deposit is Stale.** — A lapse of thirty-one days does not raise the presumption that it is dishonored paper, even in States which hold that a certificate of deposit is due at its date.[1]

Where the owner has indorsed the certificate, and carelessly allowed it to pass beyond his control, one who buys it in good faith, for value and within a reasonable time, is entitled to protection.[1]

But (as is held by some courts as in regard to checks) a certificate of deposit is stale after six years, and is taken as dishonored paper, and the holder cannot enforce its second payment by the bank.[2] But in New York a transfer of a certificate (that bore interest) seven years after date does not subject the holder to prior equities.[3]

§ 304. **Payment by Certificates of Deposit. — In general only Conditional Payment.** — A certificate of deposit is presumed to be taken, not as cash, but as a convenient means of obtaining cash, and where a certificate was given as a loan,[0] and the bank failed before maturity, the lender was held to bear the loss.[1]

Where a State treasurer, upon beginning his duties, instead of demanding the funds due from his predecessor in cash, accepts in payment thereof certificates of deposit issued by a bank in which such funds have been deposited for safe-keeping, he is chargeable, upon the subsequent failure of said bank, for the amount of such funds.[2]

[9] Munger *v.* Albany City National Bank, 85 N. Y. 587; Pardee *v.* Fish, 60 N. Y. 265; Bellows Falls Bank *v.* Rutland County Bank, 40 Vt. 377; Fells Point Savings Institution *v.* Weedon, 28 Md. 320.

[1] § 303. Birch *v.* Fisher, 51 Mich. 36, 16 N. W. 220 (1883).

[2] Gregg *v.* Union County National Bank, 87 Ind. 238. See also Tripp *v.* Curtenius, 36 Mich. 497 (1877).

[3] National Bank *v.* Washington County National Bank, 5 Hun (N. Y.) 605 (1875).

[0] § 304. See State *v.* Corning State Savings Bank, 136 Iowa 79, 113 N. W. 500 (1907); Brown *v.* Sheldon State Bank, 139 Iowa 83, 117 N. W. 289 (1908); State *v.* Corning State Savings Bank, 139 Iowa 338, 115 N. W. 937 (1908).

[1] Burrows *v.* Bangs, 34 Mich. 304 (1876).

[2] State *v.* Hill, 47 Neb. 459, 66 N. W. 541 (1896).

§ 305. **Collecting Bank taking its own Certificates in Payment.** — By custom banks receive their own certificates of deposit as payment, and such custom will be judicially noticed by the courts, and will justify a collecting bank in receiving its own certificate of deposit in payment of paper it holds for collection; and the debtor is discharged, even though the bank fails before remitting. And especially will this be so where the owner of the paper directed the bank to remit by draft, for he is presumed to have intended a draft of the collecting bank.[1]

From the language of the court in this case it would seem that, custom or not, the payment ought to be good. "The plaintiff in effect claimed that the debtor should have presented his certificates of deposit at the bank counter, and had the money counted out to him, and then counted it back to the cashier. The law does not require any such vain and unnecessary formality."

This is sound, of course, if the certificate would really have been paid by the bank, and the fact that the bank received it as payment is proof that it would have paid cash if demanded. In respect to the transaction as a question of custom, the court said that the ignorance of the plaintiff as to the existence of such usage was of no moment; every business man must be held to know the method by which nearly all banks in the country transact business by checks, drafts, and certificates of deposit.

Taking Own Certificate Held to be a Fraud, and the Depositor Preferred

A. sold land to B., and forwarded the deed to the C. bank, to be delivered to B. on payment to the C. bank of $2000, which was to be *remitted to A. at once*. The bank took its own certificates of deposit from B., and failed the same night before remitting to A. *Held*, it was a fraud on A. to take the certificates instead of cash, and that the funds in the hands of the assignee were impressed with a trust in favor of A. to the extent of $2000, which should be paid in preference to other claims.[2]

§ 306. **Lost Certificate.** — A negotiable certificate of deposit lost before indorsement cannot give the finder any title, and although it says "payable on return of this certificate", the bank

[1] § 305. British & American Mortgage Co. *v.* Tibbals, 63 Iowa 468, 19 N. 319.

[2] Francis *v.* Evans, 69 Wis. 115, 33 N. W. 93. But see Schafer *v.* Olson, 24 N. D. 542, 139 N. W. 983, 43 L. R. A. (N. S.) 762 (1913).

has no right to require a bond of indemnity from the depositor before paying him the money.[1]

No one can be a *bona fide* taker of a certificate of deposit, unless he takes within a reasonably short time; otherwise banks could issue certificates with the same effect as bank bills. If a certificate is due at the time of its loss, the subsequent holder is subject to the equities, and a payment by the bank to the loser would bar an action by such holder, wherefore no bond of indemnity is required.[2]

Although ordinarily one who demands payment of a certificate of deposit must surrender the certificate,[3] the bank is not entitled to retain the money if the certificate is not forthcoming. The depositor is entitled on proof of loss, and indemnity, if required, to relief in equity.[4]

§ 307. **Interest on Certificate of Deposit.** — A rate of interest specified, as six per cent from date, continues after maturity, and until the certificate is paid.[1]

§ 308. **Certificate to Order of Husband or Wife.** — S. deposited money and received a certificate payable "to the order of S., or of E., his wife." It was held that the death of S. revoked the power of E. to draw the money; during the life of S. her power was that of an agent, and S. could have revoked it at any time, and the death of the principal revoked the agent's authority.[1]

It would seem much more probable that the intent of such an arrangement was to give the wife a power over the deposit concurrent with that of S., or at least only second to it, and that the death of S., instead of diminishing the power of E., only

[1] § 306. Citizens' National Bank *v.* Brown, 45 Ohio St. 39, 11 N. E. 799 (1887). See Divine *v.* Unaka National Bank, 125 Tenn. 98, 140 S. W. 747, 39 L. R. A. (N. S.) 586, n. (1911), which says that a bank is entitled to have certificates of deposit surrendered when it makes payment, or in case they cannot be surrendered because of loss or other impossibility of production, then to have a bond of indemnity given to protect it. See also, *In re* Cook, 86 App. Div. 586 (1903), 83 N. Y. S. 1009. But see Zander *v.* New York Security etc. Co., 178 N. Y. 208, 70 N. E. 449 (1904).

[2] Brown *v.* Citizens' National Bank, 38 Bank. Mag. (Am.) 135; 18 Bank. Mag. (3d series, Am.) 135.

[3] Read *v.* Marine Bank, 59 Hun (N. Y.) 578.

[4] Bank *v.* Little, 17 Gr. Chy. R. (Canada) 685.

[1] § 307. Cordell *v.* First National Bank of Kansas City, 64 Mo. 600 (1877); Payne *v.* Clark, 23 Mo. 259 (1886).

[1] § 308. Baltimore *v.* Wrightson, 63 Md. 81 (1884); citing Murray *v.* Cannon, 41 Md. 476. See Smith *v.* Haire, 133 Tenn. 343, 181 S. W. 161 (1915), holding that the word "or" is equivalent to "and."

eliminated the power of S. and left that of E. to reign alone. If a thing may be done by S. or by E., the vanishing of the term S. leaves E. the only one able to do that thing, — in this case drawing the money. The other construction makes the whole sentence equal only to the first clause.

§ 309. **Interest Accounts.** — Ordinarily, as to deposits in an incorporated bank the rule is that a general deposit draws no interest[1] unless by agreement[1a] until upon demand[1b] for payment it is refused[1c] or unreasonably delayed,[2] or by virtue of statute, or

[1] § 309. First National Bank *v.* Coleman, 11 Brad. (Ill.) 511; Hilburn *v.* Mercantile National Bank, 39 Colo. 189, 89 Pac. 45 (1907); Clark's Adm'r *v.* Farmers' National Bank, 124 Ky. 563, 99 S. W. 674 (1907); Bank of Commerce *v.* Harrison, 11 N. M. 50, 66 Pac. 460 (1901).

The payment of interest on deposit is a modern custom resulting from competition and, in the absence of statutory authority, would be unlawful. Commercial Banking etc. Co. *v.* Citizens' Trust etc. Co., 153 Ky. 566, 156 S. W. 160, 1915C Ann. Cas. 166, n., 45 L. R. A. (N. S.) 950, n.

[1a] A printed paragraph on the back of a demand certificate of deposit which purports to be an interest agreement signed by the printed signatures of the depositing bank and other banks, to the effect that an allowance of three per cent interest would be made on deposits left undrawn for six months is not, as a matter of law, a part of the contract. Anderson *v.* First National Bank, 144 Iowa 251, 122 N. W. 918, 138 Am. St. Rep. 288 (1909).

When a deposit is received from the judge of probate, under Mass. Rev. Laws c. 150, § 23, the contract is with him; and if the agreement is that interest will be paid, with a reservation that such may be discontinued upon ten days' notice, a notice, to be effectual, must be given to him; and if it is given only to the beneficiary or to the register of probate it is not sufficient to stop the accumulation of interest. Cole *v.* New England Trust Co., 200 Mass. 594, 86 N. E. 902 (1908).

[1b] The presentation of a claim to the receiver of an insolvent bank and its allowance by the court are equivalent to a demand. Baker *v.* Williams Banking Co., 42 Or. 213, 70 Pac. 711 (1902).

The appointment of a temporary receiver and his assumption of possession of the assets excuses demand, People *v.* Merchant's Trust Co., 116 App. Div. 41 (1906), 101 N. Y. S. 255. But see Patten *v.* American National Bank, 15 Colo. App. 479, 63 Pac. 424 (1900).

[1c] When a bank closes its doors — suspends payment — it expresses its refusal to pay and the depositor is entitled to interest from that time. *Ex parte* Stockman, 70 S. C. 31, 48 S. E. 736, 106 Am. St. Rep. 741 (1904).

But the depositor is not entitled to interest merely from the fact that the bank has temporarily suspended and its assets are temporarily in the hands of a receiver. Patten *v.* American National Bank, 15 Colo. App. 479, 63 Pac. 424 (1900).

[2] Parkersburg National Bank *v.* Als, 5 W. Va. 50; Jassoy *v.* Horn, 64 Ill. 379; Stearns *v.* Brown, 1 Pick. (Mass.) 531; Dodge *v.* Perkins, 9 Pick. (Mass.) 368; Pierce *v.* Rowe, 1 N. H. 182; Griswold *v.* Chandler, 5 N. H. 497; Wendell *v.* French, 19 N. H. 213; Stark *v.* Gamble, 43 N. H. 468; Parsons *v.* Treadwell, 50 N. H. 356; First National Bank *v.* State Bank,

on account of the default of the party liable to pay,[2a] and defending a suit in good faith is not unreasonable or vexatious delay.[3]

Interest on a deposit runs from demand, and a counter-claim asking to have the deposit set off against a claim on the depositor is sufficient demand.[3a]

Agreement

Private bankers usually pay interest on customers' balances, and, *e converso*, charge interest on their overdrafts. With us, however, it is a proper subject of a special agreement or understanding between the parties. In England it might be judicially noticed and assumed by the courts as the regular course of business. But probably it would not be so with us, where private banking is carried on much less extensively. Such agreements may be entered into also with an incorporated bank, though certainly they would never be assumed in dealings with a corporation or association, however it might be with a firm or an individual in the business. It naturally happens that nearly all the cases which we find on this subject are English.[4] They chiefly concern disputes which arise as to when rests may be taken, and as to what rate of interest shall be allowed in cases not specifically provided for by distinct agreement.

Usage and Mode of Dealing

(*a*) Usage, if it contravenes no law, will govern in such controversies. So when a banker and his customer are shown to have conducted their banking account for a series of years upon a certain specified system, which is not in itself intrinsically illegal, it will be assumed that that system had been originally agreed upon

15 N. D. 594, 109 N. W. 61 (1906); Bowman Bank etc. Co. *v.* First National Bank, 18 N. M. 589, 139 Pac. 148 (1914).

[2a] Forschirm *v.* Mechanic's etc. Bank, 137 App. Div. 149 (1910), 122 N. Y. S. 168.

When a solvent bank, able to pay its depositors in full, is compelled to suspend payment by the superintendent of banks who caused the attorney general to institute suit for the dissolution of the bank, in which a voluntary receiver was appointed but which suit was later dismissed and the receiver discharged, the bank is not liable for interest on a deposit due only upon demand, in the absence of demand or some act of its own excusing demand. Forschirm *v.* Mechanics' etc. Bank, *supra*.

[3] Aldrich *v.* Dunham, 16 Ill. 403.

[3a] Sickles *v.* Harold, 149 N. Y. 332, 43 N. E. 852.

[4] Gwyn *v.* Godby, 4 Taunt. 346; Ikin *v.* Bradley, 5 Price 536; Crosskill *v.* Bower, 32 Beav. 86.

between them, and the principles involved in it will be held binding for the solution of any subsequent disagreement.[5] But acquiescence in the general system does not go further than to fix the principle upon which the accounts shall be computed; it does not admit the accuracy of particular items, any of which may be disputed.[6]

Cannot Control the Usury Laws

(*b*) It is necessary, however, that the principle which it is sought thus to establish should be one which is in itself strictly legal. Thus, it cannot be questioned that a bank, or banker, equally with any other individual, is subject to the operation of the usury laws, and cannot exact more than the legal rate of interest, either directly or indirectly. The custom pursued in discounting, of deducting the interest at the beginning of the term of the loan, thereby in fact gaining a very little more than the strict legal rate, is allowed, and has been sanctioned by the courts. This matter is treated under the topic "Discount."[7]

"Rests", or Frequent Compounding of Interest

(*c*) One of the most common methods of circumventing the usury laws is by taking "rests" at very short intervals, and so compounding the interest many times, perhaps, in the course of a single year. That "rests" may be taken at intervals of proper length is undoubted; the only question is, what interval is proper? In Clancarty *v.* Latouche, *supra*, a compounding at tri-monthly rests was declared to be usurious and intolerable. In Rufford *v.* Bishop,[8] it was said that the decision in Clancarty *v.* Latouche seemed to throw some doubts on rests at a less interval than one year, but that it must be admitted that shorter rests were legal. No definite rule of law therefore exists on the point. In the United States, accountings in every branch of business are customarily had more promptly and frequently than is usual in England, and it is quite probable that tri-monthly rests might be sanctioned, if agreed to by both parties.

The nature of the customer's indebtedness to his banker for advances is not affected by the fact that the final footing is cast so as to include interest, which, by rests at proper intervals, has

[5] Mosse *v.* Salt, 32 Beav. 269.
[6] *Ibid.*; Clancarty *v.* Latouche, 1 Ball & B. 420.
[7] Maine Bank *v.* Butts, 9 Mass. 49.
[8] 5 Russ. 346.

been from time to time converted into principal, and has since itself also borne interest. Hence a mortgage, given generally to secure the customer's balance, will secure a balance of which such interest, and interest upon interest, are component parts.[9] But where a mortgage is given by the customer to secure a specific balance owing by him on a certain day, and subsequent transactions are had between the parties, in which, as well as in those which had preceded the mortgage, compound interest was uniformly charged, it was nevertheless held that the precise sum secured by the mortgage was thereby at once excepted from the general custom governing the other dealings of the parties, and that interest could not thereafter be compounded thereon, but must be calculated at simple rates, as in all cases of ordinary mortgage debts.[10]

Death, Settlement, or Insolvency Destroys a Special Contract Rate of Interest on a Deposit

(*d*) When a judgment is recovered by the bank against the customer for overdrafts or advances, interest will be allowed at the same rate which the bank itself was paying upon deposits on the same account.[11] But where the banker and the customer arrange that all indebtedness of either to the other shall bear interest at a certain rate per cent, yet upon the death of the customer, or upon his closing his dealings with the banker, being at the time indebted to him, or upon his insolvency, or upon the death of the banker, or his ceasing to carry on business, or becoming bankrupt, the special arrangement at once ceases to operate, and from the date of such occurrence the balance of indebtedness then due from either to the other carries only such simple interest as is carried by any other ordinary contract debt.[12]

Up to What Time Interest is to be Cast on a Deposit in Case of Acceptance of Check

(*e*) In casting interest or making the charge to the drawer, it is clear that the banker must debit the drawer of a check, not

[9] Rufford *v.* Bishop, *supra.*

[10] Mosse *v.* Salt, 32 Beav. 269.

[11] Gwynn *v.* Godby, 4 Taunt. 346; Ikin *v.* Bradley, 5 Price 536.

[12] Crosskill *v.* Bower, 32 Beav. 86. See People *v.* Merchants' Trust Co., 116 App. Div. 41 (1906), 101 N. Y. S. 255, affirmed in 187 N. Y. 293, 79 N. E. 1004.

from the date of the drawing but from the date of the actual payment of the check.[13] If the banker accepts the check some time before actually paying it, it has not been decided whether he may debit the drawer from the date of the acceptance or from that of the paying. But it has been said that the accepting of a check payable at a day future is equivalent to a loan of the amount named, by the drawer to the banker, for the interval. Following this principle, it would practically amount to a debiting at the time of payment. For if the debit were made at the time of acceptance, yet the acceptance, creating at once a loan from the depositor to the banker for the interval, would cause interest to run on the same sum, for the same period at the same rate per cent, from the banker to the customer, and the one amount would exactly offset the other. But since the acceptance only binds the banker, at his own peril, to have funds enough of the depositor to meet it when payment is demanded, and as until such demand he has the full use of such funds, it would seem interest should in reason be calculated to the date when demand may be made.

Although this reasoning is good as to an acceptance of a check before delivery by the drawer, or as to a check payable at a future day, yet in other cases, as the acceptance amounts to payment so far as the drawer is concerned, he should not receive interest upon the amount of the check after such certification. The money is transferred at once from the drawer's account to the account of certified checks, and becomes substantially a deposit of the holder of the check, and if any one receives interest he should. The drawer should not receive interest on funds in which he has no interest.

(*f*) From the rule that the banker is in no sense a trustee, or quasi trustee, for the benefit of his customer, it follows that, under an agreement to allow interest, he is under no obligation annually to balance the account and credit the interest, so as to prevent the running of the Statute of Limitations.[14]

[13] Goodbody *v.* Foster, cited to this point in Byles on Bills, Sharswood's ed., p. 25.

[14] Pott *v.* Clegg, 16 M. & W. 321; Foley *v.* Hill, 2 H. L. Cas. 40.

CHAPTER XX

PAYMENT OF DEPOSIT

See Payment of Notes, § 556. Of Checks, § 362. Of Forged Checks, § 461.

DUTY OF BANK.

(A) By contract implied [311] from the course of business, it is the duty of a bank to pay, over its counter, or through the clearing-house,[318] (according to the manner of presentment), in good money [312] upon presentment in banking hours of a

Genuine,[461] valid,[316] subsisting.

(The bank may take time to inquire if the order is stale or otherwise suspicious.)

Written,[313]

(It may pay on the verbal order, if it so elects, but is entitled to written evidence of authority for a payment.)

Properly drawn order for the whole or any part [315] of the deposit (if the order is *bona fide*, in the regular course of business, and not merely to vex the bank by numerous suits), signed by the depositor, or by his authorized agent [314] or representative, or by the person who has proved his ownership of the deposit against the depositor,[565] and [341] if the bank has to the credit of the drawer sufficient available funds to cover the order (if the bank has part funds, its duty is to pay as much as it can, if the holder is willing to receive part payment, and is willing to give up the order to the bank, but this view is not uniformly adopted), and free from a right of retention by the bank, in consequence of a lien,[323] set-off,[323] attachment,[346] injunction,[347] adverse claim,[341] or incumbrance, by agreement or otherwise, *provided* that the Statute of Limitations [321] has not run against the account.

Misapplication.[317] And it is no *excuse* for a bank's refusal to honor an order properly drawn and signed, that it has reason to believe that the moneys (*e. g.* trust funds) are to be applied as the drawer has no right to apply them, unless it *participates in the profits of the payment with knowledge, actual or constructive*, of the facts that make the application of the money wrong; in such case it is not only excused, but prohibited from making the payment.

But it is an excuse that it has been *forced* to pay by a power it could not resist, as a public enemy.[318]

If the drawer has *revoked* the order before the bank has made pay-

ment or bound itself to pay, it must not pay, nor if the drawer is *insane*, and the bank has notice[319] of it, or if the drawer is *dead*, not being a corporation or a firm (it is to be hoped that this law of revocation by death as to checks will be changed by statute), and the payments made will be appropriated[355] in their order, the first sum drawn being deemed a payment *pro tanto* of the first sum deposited, even though some of the items of the account were trust moneys.

This is the general rule; but, as a very just modification, it has been held that a depositor will be presumed[355] to be drawing his own rather than trust moneys when the two are mingled, though the latter were the earliest deposits; and if trust funds can be traced into a deposit, they will not be deemed to come out, so long as the payments can be otherwise accounted for.

Any payment subsequent to the deposit will not touch it so long as there is enough other money to make the payment, even though this was put in bank after the trust money, but before the payment.

Over-drafts[356] may be a fraud on the holder of the order, though not on the bank; but if the bank pays, whether knowing the facts or not, it can recover from the drawer.

Void Paper. § 316.

Corporate obligations that are *ultra vires* by circumstances unknown to the bank, if paid by it, may be charged to the obligor; but it is otherwise if the bank has notice of the facts invalidating the paper, or if it pays on paper that would not be enforceable in the hands of a *bona fide* holder for value, as, for example, such as was signed under duress, or by an infant, etc.

Payment of Checks. § 430.

Payment of Notes and Acceptances. § 556.

(B) Succession of Banks. § 320.

When one bank succeeds to the business and assets of another, the depositors of the swallowed bank become depositors of the successor, and the transfer does not set the Statute of Limitations running against them.

(C) Unclaimed Deposits. § 320 A.

§ 311. **Obligation of the Bank to honor Orders.** — The bank is under the obligation of honoring the customer's[0] drafts and checks whenever the same are presented for payment, provided that at the time of such presentment the balance of the account, if then struck, would show a credit in favor of the customer of funds, on which the bank has no lien, sufficient to meet the sum called for by the check or draft[0a] The contract so to honor the

[0] § 311. It is doubtful if he who has the beneficial interest can maintain an action for the money. He cannot do so unless he shows clearly that the money belongs to him and that he is entitled to receive it. Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804 (1901).

[0a] But when a bank is threatened with insolvency it may give security for the performance of its already legal duty. Wylie *v.* Commercial etc. Bank, 63 S. C. 406, 41 S. E. 504 (1901).

depositor's orders is implied from the usual course of business. The deposit is made with the tacit understanding that the bank shall respond to the depositor's orders, so long as there is sufficient balance to his credit.[1]

A banker "gives the community to understand that those who have funds in his hands have not only the right to draw

[1] Downes *v.* Phœnix Bank, 6 Hill (N. Y.) 297; Marzetti *v.* Williams, 1 Barn. & Ad. 415; Watson *v.* Phœnix Bank, 8 Met. (Mass.) 217; First National Bank *v.* Pease, 68 Ill. App. 562; Bates *v.* Capital State Bank, 18 Idaho 429, 110 Pac. 277 (1910); American National Bank *v.* Fidelity Co., 129 Ga. 126, 58 S. E. 867 (1907); Wood *v.* American National Bank, 100 Va. 306, 40 S. E. 931 (1902); Callahan *v.* Bank of Anderson, 69 S. C. 374, 48 S. E. 293 (1904); Silisbee State Bank *v.* French Market Grocery Co., 103 Tex. 629, 132 S. W. 465, 34 L. R. A. (N. S.) 1207, n. (1910); Petrue *v.* Wakem, 99 Ill. App. 463 (1902); McBee *v.* Purcell, 1 Ind. T. 288, 37 S. W. 55 (1896), the money is payable at the bank.

Payment to husband of depositor without orders will not remove the liability to depositor. Robards *v.* Hamrick, 39 Ind. App. 134, 79 N. E. 386 (1906).

But the bank is not liable to a depositor if the money received by the bank does not in equity and good conscience belong to the depositor, or if the money has been paid out on the order of one who had authority to give it, or if the depositor has ratified the payment. Warren etc. Co. *v.* Miners' etc. Bank, 166 Ill. App. 540 (1911).

If money is deposited in a bank to the credit of a third party upon the performance of a condition for the depositor's benefit, the bank cannot pay out the money to the third party until the condition is fulfilled. Republic Life Ins. Co. *v.* Hudson Trust Co., 130 App. Div. 618 (1909), 115 N. Y. S. 503, affirmed in 198 N. Y. 590, 92 N. E. 1100.

It is no defense that the officer receiving the money converts it to his own use. Scow *v.* Farmers' etc. Bank, 136 Iowa 1, 111 N. W. 32 (1907); or had cancelled certificates of deposit and absconded with the money. Griffin *v.* Marlette State Bank, 150 Mich. 499, 114 N. W. 325 (1907); or had loaned the depositor money so as to secure a greater rate of interest. Short *v.* Butler, 136 Mo. App. 356, 117 S. W. 114 (1909).

And when a private banker opens a bank and receives deposits he assumes a personal obligation to repay the same, and he cannot relieve himself of such obligation by transferring the bank and its deposits to another, but he remains primarily obliged to repay to each depositor what he had on deposit at the time of the transfer or what he might thereafter deposit in ignorance of such transfer; and the depositor's right is not discharged by his filing a claim with the receiver of the assignee and accepting a dividend from him, even though such assignee had agreed to repay the deposit. Johnson *v.* Shuey, 40 Wash. 22, 82 Pac. 123 (1905).

The bank does not make payment because it is the agent of the depositor but to discharge *pro tanto* the simple debt which it owes the depositor. Havana Central R. Co. *v.* Central Trust Co., 204 Fed. 546 (1913).

There is no need of demand by means of a formal check when the bank denies that it holds any of depositor's money, or is indebted to him. Altman *v.* Phillips County Bank, 86 Kan. 930, 122 Pac. 874 (1912).

upon the deposit, but that all drafts will be paid on presentation; he opens virtually a letter of credit to his depositor, which is a guaranty to him, as well as to all who made advances on the faith of it. For all practical purposes it assimilates itself to a parol promise to pay any check that the owner of the deposit may draw; and thus the rule which binds the drawee of a bill of exchange as an acceptor, when he has promised in advance to honor it, furnishes a strong analogy." [2]

§ 312. **For what Description of Funds Depositor is entitled to Draw.** — As a general rule, the depositor, having once brought his funds securely into the hands of the proper officer, and having duly received his credit for the amount in dollars and cents, has thereafter a perfect claim on the bank for this amount, *in money*.[1] One of the cited cases shows that when a deposit was made in good faith of the bills of a bank, supposed at the time by both parties to be solvent, but which had in fact already stopped payment, and the amount was in ordinary course passed to the credit of the depositor as so much money, so many dollars, the bank was held to repay the amount in good money; although it was shown as a fact that the bills had been kept by themselves, and not mingled with the general funds of the bank, and that they still continued so when the insolvency of the issuing bank was discovered, when the receiving bank promptly sought to undo the credit. Precisely the same rule applies where the bank undertakes to make a collection for its customer, and passes the amount to his credit. (§ 248.) In neither case is there any bailment of the specific funds or money received by the bank; but at once, upon the giving credit in ordinary form, the simple indebtedness accrues which, like any other indebtedness, can only be discharged in funds which the law makes a legal tender. This has been repeatedly held in the Western States where bank bills of the so-called "wild-cat banks" were deposited, and credit given for the nominal value in dollars and cents. Frequently, the depreciation of these bills had begun at the time of deposit; often they sunk almost immediately afterwards through every stage of depreciation to utter worthlessness. But the courts uniformly held that the credit given for so much money could only be discharged by so much "money", and that bills similar to those received, or even the identical ones, could not be forced upon the

[2] McGregor *v.* Loomis, 1 Disney (Ohio) 251.

[1] § 312. Thompson *v.* Riggs, 5 Wall. 663, 18 L. ed. 704.

customer in payment.[2] So where the deposit was made in bills of the bank itself, and they were at the time greatly depreciated, it was held that payment must nevertheless be made in full in good money.[3] The right of the depositor is not, however, necessarily to the gold or silver coin of the country; but only to such money as is by the law of the land legal tender at the time. Hence it has been held that a deposit made in 1860 in gold could, after the passage of the Legal Tender Act so called, be paid off in the Treasury notes of the United States to the same nominal amount, without regard to their excessive depreciation in fact.[4] *Semble* that payment by a bank within the Confederate States, made in Confederate notes to a United States quartermaster, under the stress of military orders of the United States general commanding in the place, may acquit the indebtedness of the bank to the depositor, provided the original deposit was made in Confederate notes.[5] But a depositor of Confederate notes, though at the time of the deposit they were bankable funds at the place, was held to be not entitled afterward to recover the amount from the bank in good money.[6] Of course any local custom to make and receive payments in other than the legal money cannot, in the absence of an express agreement between the parties, affect the rule of law; and evidence of such a custom is impertinent.[7] But if the bank specially agrees only to make payment in something else than legal tender, whether of greater or of less value, such a contract between the bank and the depositor may be binding.[8]

See also title "Special Deposit."

§ 313. **Verbal Order.** — The order is almost always expressed in writing, by check or otherwise. But there is no absolute

[2] Corbet *v.* Bank of Smyrna, 2 Harr. (Del.) 235; Marine Bank of Chicago *v.* Chandler, 27 Ill. 525; Marine Bank of Chicago *v.* Birney, 28 *id.*, 90; Marine Bank of Chicago *v.* Rusmore, *id.*, 463; Marine Bank of Chicago *v.* Ogden, 29 *id.*, 248; Chicago Mar. & Fire Ins. Co. *v.* Carpenter, 28 *id.*, 360; Willetts *v.* Paine, 43 *id.*, 433; Fort *v.* Bank of Cape Fear, 1 Phill. L. (N. C.) 417. See also the pages on the "Payment of Checks," § 430.

[3] Bank of the Commonwealth of Kentucky *v.* Wister, 2 Pet. 318, 7 L. ed. 437.

[4] Carpenter *v.* Northfield Bank, 39 Vt. 46; Sandford *v.* Hays, 52 Pa. St. 26; Gumbel *v.* Abrams, 20 La. Ann. 568; and see "Special Deposits."

[5] Nelligan *v.* Citizens' Bank of Louisiana, 21 La. Ann. 332.

[6] Foster *v.* Bank of New Orleans, 21 La. Ann. 338.

[7] See cases from Illinois Reports, above cited; Thompson *v.* Riggs, 5 Wall. 663, 18 L. ed. 704.

[8] Thompson *v.* Riggs, 5 Wall. 663, 18 L. ed. 704.

necessity for this. A verbal direction from the customer to the bank to pay a sum, or to transfer a credit, would fully justify the bank in so doing. If the bank itself is willing to act upon a verbal order, this would be a perfect defence to a suit by the depositor for the amount transferred under it.[0] But though the bank may, if it choose, act upon such directions, it is under no obligation to do so; by the usages of the banking business it is entitled to demand some written evidence of the order.[1]

If the bank accepts a verbal direction, and, either expressly or by fair implication, consents to follow it, it cannot thereafter be heard to say that it is only required to follow written directions.[2]

If the bank substantially follows the instructions of the depositor in making payments, it is not liable.[3]

§ 314. **Payment without Order from the Depositor.** — The agent of H. deposited in the P. Bank money of H., without the knowledge of the latter, writing in the bank register "N. H. by S. A. P." The bank issued a certificate payable to N. H., and afterwards paid the money to the agent on his indorsement of the certificate "N. H. by S. A. P." H. ratified the deposit, and sued the bank for the amount. *Held*, that the bank had no right to assume that N. H. was a fictitious principal, and that, as the agent had no authority to draw, the bank must reimburse H., and that the full amount shown on two certificates of deposit could be recovered, although the money drawn by the agent on the first *may* have been used to buy the second.[1] McFarland and Paterson, JJ., dissenting.

[0] § 313. Ellis *v.* First National Bank, 22 R. I. 565, 48 Atl. 936 (1901); Whitsett *v.* People's National Bank, 138 Mo. App. 81, 119 S. W. 999 (1909). See Newmark Grain Co. *v.* Merchants' National Bank, 166 Cal. 203, 135 Pac. 958 (1903).

[1] Watts *v.* Christie, 11 Beav. 546; Coffin *v.* Henshaw, 10 Ind. 277; Walker *v.* Rostron, 9 M. & W. 421; McEwen *v.* Davis, 39 Ind. 111; First National Bank *v.* Stopf, 165 Ind. 162, 74 N. E. 987, 112 Am. St. Rep. 214 (1905).

[2] Armour *v.* Bank, 69 Miss. 706, 11 So. 28 (1892).

[3] Petty *v.* Gacking, 97 Ark. 217, 133 S. W. 832, 33 L. R. A. (n. s.) 175, n. (1911).

[1] § 314. Honig *v.* Pacific Bank, 73 Cal. 464, 15 Pac. 58; Kerr *v.* People's Bank, 158 Pa. St. 305, 27 Atl. 963.

A bank which pays a certificate of deposit to an agent on his indorsement "J. P. Co., C. A. J. Supt." is liable to the true owner therefor unless it proves that C. A. J. had authority to indorse. Jackson Paper Mfg. Co. *v.* Commercial National Bank, 199 Ill. 151, 65 N. E. 136, 93 Am. St. Rep. 113, 59 L. R. A. 657 (1902). See Henshaw *v.* State Bank, 239 Ill. 515, 88 N. E. 214, 130 Am. St. Rep. 241 (1909), indorsed "H. W. C. Trustee";

§ 315. **Order may be for Part of the Deposit.** — *Bona fide* in the regular course of business, and not for mere vexation of the bank, the customer may draw out his funds in such parcels as he may see fit, both as regards number and amount. The rule of law forbidding a creditor to split up his demand does not affect this principle, which is based upon a custom of the banking business that has been well said to be so ancient, unquestioned, and well known that courts will take judicial notice of it, without proof.[1] But in the case cited of Chicago Ins. Co. *v.* Stanford, the court said, that if there should be a dispute between the bank and the customer, and the latter should draw a multitude of checks, not in the ordinary course of *bona fide* business, but for the purpose of vexation and of bringing a proportionate number of suits against the bank, then the court would apply itself to find some remedy. In England it was, until lately, contrary to law to draw a check for less than 20*s.*; but by a recent statute a check for any sum may be legally drawn, if it be *bona fide* against funds of the drawer actually in the hands of the banker. In our own country the law sets no limit whatsoever, and annexes no conditions.

§ 316. **Payments on Void Paper.** — If obligations issued by a depositor have been declared void, the bank, knowing this, must not pay them.

Brown *v.* Dougherty, 120 Fed. 526 (1903), husband deposited money in wife's name and subsequently withdrew it without her knowledge or consent; Bates *v.* First National Bank, 89 N. Y. 286; Heath *v.* New Bedford Safe Deposit Co., 184 Mass. 481, 69 N. E. 215 (1904), the bank asked him who made the deposit in the name of another to draw it out; Fricano *v.* Columbia National Bank, 118 App. Div. 567 (1907), 103 N. Y. S. 189, money paid to the son of the depositor.

If certificates of deposit are payable to M. or his guardian, the bank is liable for having paid the money to T. who was not the guardian but who had changed the certificates so as to read "pay to M. or guardian T." McMahon *v.* Germania-American National Bank, 111 Minn. 313, 127 N. W. 7, 29 L. R. A. (N. S.) 67, n. (1910).

The bank assumes the duty of seeing that the money of its depositor is paid to his order or for his use and account, and if, as garnishee, it pays his money for one who has the same name it is still liable to the depositor for the amount so paid. O'Neil *v.* New England Trust Co., 28 R. I. 311, 67 Atl. 63, 125 Am. St. Rep. 740, 11 L. R. A. (N. S.) 248, n. (1907).

The bank can justify a payment on the depositor's account only upon the actual direction of the depositor. Critten *v.* Chemical National Bank, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529 (1902); Seaboard National Bank *v.* Bank of America, 193 N. Y. 26, 85 N. E. 829 (1908).

[1] § 315. Munn *v.* Burch, 25 Ill. 35; Chicago Ins. Co. *v.* Stanford, 28 *id.*, 168; Byles on Bills. *21, Sharswood's note (Sharswood's ed.).

A pension check issued to a payee who is, at the time of issue, deceased is absolutely void.[0]

A bank "could not become the depositary of the collected taxes of the people for a valid and legal purpose, and, with full knowledge of the illegal and void character of the bonds, which had been over-issued, permit the money in its possession to be misappropriated to the discharge of those bonds. To sanction such a principle would allow every trustee of moneys to account for them by the known misconduct of others, and release him from his duty to see that the trust fund under his control is not diverted from the trust with his knowledge and consent." [1]

If an obligation that would be void in the hands of a *bona fide* holder for value without notice (as if signed under duress, or by an infant) is paid by the bank without notice, it is in the same position as such a holder; indeed it is just such a holder itself, and cannot charge the deposit with the payment if the paper is repudiated by the obligor. But if an obligation is a corporate one and merely *ultra vires* by circumstance unknown to the bank, it will have a right to charge the corporation with the payment.

§ 317. **Bank's Duty as to Trust Fund.** *Banker cannot Inquire into Third Person's Affairs, nor Refuse to Pay a Check merely because he is Aware of an Intended Breach of Trust.* — The banker cannot excuse his disobedience of his customer's orders, in the due course of business, by setting up that he knew, or had reason to believe, that the customer's order was given in promotion of an unlawful purpose.[0] For example, the banker is not justified in refusing to honor the depositor's check because he knows or believes that the check is an appropriation of funds to a person or for a purpose to whom or for which the depositor is not lawfully authorized to appropriate these funds.[1]

"Supposing that the banker becomes incidentally aware that

[0] § 316. United States *v.* First National Bank, 82 Fed. 410 (1897).

[1] Howard *v.* Deposit Bank, 80 Ky. 496.

[0] § 317. Merchants & Planters' Bank *v.* Meyer, 56 Ark. 499, 20 S. W. 406 (1892); McCord *v.* California National Bank, 96 Cal. 197, 31 Pac. 51.

[1] Gray *v.* Johnston, L. R. 3 H. L. Cas. 14, per Lord Westbury; Newburyport *v.* Spear, 204 Mass. 146, 90 N. E. 522, 134 Am. St. Rep. 652 (1910); Lowndes *v.* City National Bank, 82 Conn. 8, 72 Atl. 150, 22 L. R. A. (N. S.) 408 (1909); Interstate National Bank *v.* Claxton, 97 Tex. 569, 80 S. W. 604 (1904).

A bank is not responsible for honoring a depositor's check when it has no knowledge that part of the money is trust money. Bank of Overton *v.* Thompson, 118 Fed. 798 (1902).

the customer, being in a fiduciary or a representative capacity, meditates a breach of trust, and draws a check for that purpose, the banker, *not being interested in the transaction, has no right to refuse the payment of the check, for if he did so he would be making himself a party to an inquiry as between his customer and a third person.*"

But if the depositor seeks to pay his own debt to the banker by an appropriation of funds to his credit in a fiduciary capacity with the banker, then the banker is affected with knowledge of the unlawful character of the appropriation, and would be compelled to refund.[2]

Where A. receives what he knows to be an asset of the estate or trust from an executor or trustee, with actual knowledge derived from the trustee of his intention to use the proceeds for his own private wants, or derived from facts as convincing as the trustee's declaration, A. will be compelled to surrender the money paid, or assets pledged to or purchased by him.[3]

But this principle does not touch the payment of checks properly

[2] Gray *v.* Johnston, L. R. 3 H. L. Cas. 14; Lund *v.* Seamen's Bank, 37 Barb. (N. Y.) 129; Clark *v.* First National Bank, 57 Mo. App. 277, citing Johnston *v.* Payne Bank, 56 Mo. App. 257; American Trust & Building Co. *v.* Boone, 102 Ga. 202, 29 S. E. 182 (1897); Carroll County Bank *v.* Rhodes, 69 Ark. 43, 63 S. W. 68 (1900); Coleman *v.* First National Bank, 94 Tex. 605, 63 S. W. 867, 86 Am. St. Rep. 871 (1901); Interstate National Bank *v.* Claxton, 97 Tex. 569, 80 S. W. 604 (1904); United States Fidelity etc. Co. *v.* Adoue & Lobit, 104 Tex. 379, 137 S. W. 648, 1914B Ann. Cas. 667, n., 37 L. R. A. (N. S.) 409, n.; Emerado Farmers' Elevator Co. *v.* Farmers' Bank, 20 N. D. 270, 127 N. W. 522, 29 L. R. A. (N. S.) 567 (1910); Fidelity etc. Co. *v.* Rankin, 33 Okla. 7, 124 Pac. 71 (1912); Allen *v.* Puritan Trust Co., 211 Mass. 409, 97 N. E. 916 (1912); Columbia etc. Co. *v.* First National Bank, 116 Ky. 364, 76 S. W. 156 (1903); Farmers' etc. Bank *v.* Fidelity etc. Co., 108 Ky. 384, 56 S. W. 671 (1900); Globe Savings Bank *v.* National Bank of Commerce, 64 Neb. 413, 89 N. W. 1030 (1902).

And when a managing director of a company fills out a blank check of the company and deposits it in payment of his own draft, the bank, acting in good faith, is not bound to inquire whether or not the company owes its managing director. Bank of New South Wales *v.* Goulburn Valley Butter Co., (1902) A. C. 543.

But see Lee *v.* Marion National Bank, 94 Ky. 43, 21 S. W. 346 (1893), where a sheriff, collector of railroad taxes, deposited the collections in a bank, and requested that it be applied to payment of a debt owed by him to the bank. The sureties on the sheriff's bond were obliged to answer for his default, and could not require the bank to account to them.

[3] Duncan *v.* Jaudon, 15 Wall. 165, 21 L. ed. 142; Colt *v.* Lasnier, 9 Cow. (N. Y.) 320; Smith *v.* Ayer, 101 U. S. 320, 25 L. ed. 955; M'Leod *v.* Drummond, 17 Ves. Jr. 153; Shaw *v.* Spencer, 100 Mass. 382.

drawn, even though the bank may know the money is drawn with intent to use it wrongfully, unless it participates in misapplying the funds,[3a] then it is liable.[4] *A fortiori*, it does not require a bank to inquire as to the drawer's intent.[4a]

"The circumstances under which a liability like that claimed here will arise against the banker is stated in Gray *v.* Johnston; and attention is there called to an important element in the consideration of such cases, which is, that a banker *cannot question the right of his customer by refusing to honor his demands by check or otherwise, upon any theory that it is the banker's duty to look after the appropriation of the trust funds when withdrawn* from the bank, and to protect the trust by setting up a *jus tertii* against the demand. This case goes further than any I have found, in some of its expressions, to justify the contention that mere knowledge of the banker that a breach of trust is intended makes him privy to it and liable. But on scrutinizing the cases cited it will *be found that participation in the profits of the fraud is*, generally speaking, an element in the case; and a mere reason to believe that the trustees were misapplying the assets will not make the banker liable; for this would be to make *every trustee accountable for his conduct* in the trust to every agent whom he happened to employ, and would carry the principle of constructive trust to an inconvenient, and indeed to an impracticable length."[5]

When a depositor has a private and a public account, being not only a public officer but an executor, and having an individual account, the law will not charge the bank with knowledge of the depositor's fraud, nor impose on it the duty of inquiry, merely

[3a] The mere payment of the checks of the depositor does not constitute a participation in an actual or intended misapplication by the fiduciary, although his conduct or course of dealings may bring to the notice of the bank circumstances which would enable it to know that he is violating his trust. Interstate National Bank *v.* Claxton, 97 Tex. 569, 80 S. W. 604 (1904).

[4] Bank *v.* Clapp, 76 N. C. 482; American National Bank *v.* Fidelity Co., 129 Ga. 126, 58 S. E. 867 (1907).

[4a] Where a wife's money is deposited by her husband in her name in a state where by statute he has the sole management of her separate estate, he would have, at least, as much power over money deposited in the bank in her name as any other trustee would have over a deposit of trust funds and the bank would be under the same liability to pay out the money on his checks. Coleman *v.* First National Bank, 94 Tex. 605, 63 S. W. 867, 86 Am. St. Rep. 871 (1901).

[5] Walker *v.* Manhattan Bank, 25 Fed. 255; Bank of Hartford *v.* McDonald, 107 Ark. 232, 154 S. W. 512 (1913); American National Bank *v.* Fidelity Co., 129 Ga. 126, 58 S. E. 867 (1907).

because he has drawn on the treasurer's account checks payable to himself or to bearer, or has transferred money from one account to another.[6] The bank is not bound to read the purpose of the drawer between the lines of the check.

A bank must honor the checks and certificates [6a] of its depositor drawn in proper form, without regard to the use the depositor is going to make of the fund; the only limitation is that the bank must not itself participate in the profits of the fraud.[7]

(*a*) If a bank participates in the misapplication of trust money it is liable; as where money deposited by A. in his own name and known by the bank to belong to another was applied by A. to pay his debt to the bank, it was held liable to the principal.[8]

Where a bank aids or participates in misapplication by entering a check payable to " H. W. C. trustee " to the individual account of the trustee, the bank is liable to the trust estate; [8a] but it is not

[6] Goodwin *v.* American National Bank, 48 Conn. 550 (1881); Central National Bank *v.* Conn. Mut. Life Ins. Co., 104 U. S. 54, 26 L. ed. 693; Newburyport *v.* Spear, 204 Mass. 146, 90 N. E. 522, 134 Am. St. Rep. 652 (1910); Lowndes *v.* City National Bank, 82 Conn. 8, 72 Atl. 150, 22 L. R. A. (N. S.) 408 (1909). Compare Allen *v.* Puritan Trust Co., 211 Mass. 409, 97 N. E. 916 (1912).

But where an agent has two accounts at a bank, one private and the other for the account of his principal, the bank is liable for transferring from the principal's account to the private account the proceeds of a check drawn to the order of the principal, indorsed by the agent and deposited to the account of the principal. Molt Iron Works *v.* Metropolitan Bank, 78 Wash. 294, 139 Pac. 36 (1913).

[6a] McCaflin *v.* Jones, 155 Ill. 539.

[7] Walker *v.* Manhattan Bank, 25 Fed. 255; Keane *v.* Robarts, 4 Madd. 332, 357; Providence Assisting Association *v.* Citizens' Savings Bank, 19 R. I. 142, 32 Atl. 306 (1895); Hatch *v.* Johnson Loan & Trust Co., 79 Fed. 828; State National Bank *v.* Reilly, 124 Ill. 464, 14 N. E. 657; Mayor *v.* Tenth National Bank, 111 N. Y. 447, 18 N. E. 618 (1888); Merchants & Planters' Bank *v.* Meyer, 56 Ark. 499, 20 S. W. 406 (1892); Sayre *v.* Weil, 94 Ala. 466, 10 So. 546 (1891); Eyrick *v.* Capital State Bank, 67 Miss. 73, 6 So. 615 (1889).

[8] Commercial Bank *v.* Jones, 18 Tex. 811. See also Clark *v.* First National Bank, 57 Mo. App. 277; American Trust & Banking Co. *v.* Boone, 102 Ga. 202, 29 S. E. 182 (1897); Armour *v.* Bank, 69 Miss. 705, 11 So. 28 (1892); citing Eyrick *v.* Capital State Bank, 67 Miss. 60, 6 So. 615; Knobelach *v.* Bank, 43 S. C. 242, 21 S. E. 13 (1894), citing Steele *v.* Atkinson, 14 S. C. 154. But *cf.* Lee *v.* Marion National Bank, 94 Ky. 43, 21 S. W. 346 (1893); Washbon *v.* Linscott State Bank, 87 Kan. 698, 125 Pac. 17 (1912); Interstate National Bank *v.* Claxton, 97 Tex. 569, 80 S. W. 604 (1904); American National Bank *v.* Fidelity Co., 129 Ga. 126, 58 S. E. 867 (1907); Lowndes *v.* City National Bank, 82 Conn. 8, 72 Atl. 150, 22 L. R. A. (N. S.) 408 (1909).

[8a] Duckett *v.* National Mechanics' Bank, 86 Md. 400, 38 Atl. 983

liable where the check is payable to trustee individually, even though the body of the check states that it is due to him as trustee, provided the bank does not participate in the deception.[8b]

When a bank receives a deposit from one acting in a representative capacity it cannot justify a payment to him of the amount deposited if it knows, or facts are presented which if acted upon, would disclose, that the fund is about to be wrongfully and unlawfully diverted from the true owner.[8b0]

A banker who knows that a fund on deposit with him is a trust fund, cannot appropriate it to his private benefit, or, where charged with notice of the conversion, join in assisting others to appropriate it for their private benefit without being liable to refund the money if the appropriation is a breach of trust.[8ba]

If a bank has notice or knowledge that a breach of trust is being committed by an improper withdrawal of funds,[8bb] or pays out public money for a known illegal purpose on an order known to be drawn without legal authority it is liable therefor.[8bc]

Where a bank applies a deposit to the payment of the trustee's individual debt, the act may be ratified by the *cestui que trust*.[8c]

A bank without inquiry discounted notes drawn by a town treasurer in his official capacity without authority. The proceeds were placed to his credit as treasurer, and town money was

(1897); Barroll *v.* Forman, 88 Md. 188, 40 Atl. 883 (1898); Bank of Hickory *v.* McPherson, 102 Miss. 852, 59 So. 934 (1912).

When the check is entered to the individual credit of a guardian the bank becomes a trustee of the fund and it can be saved from being compelled to account to the ward therefor only upon the guardian's subsequent true administration and accounting therefor. United States Fidelity etc. Co. *v.* People's Bank, 127 Tenn. 720, 157 S. W. 414 (1913). See United States Fidelity etc. Co. *v.* Adoue & Lobit, 104 Tex. 379, 137 S. W. 646, 1914B Ann. Cas. 667, n., 37 L. R. A. (n. s.) 409, n.

But mere knowledge on the part of the bank that trust funds stand to the credit of the depositor's personal account does not charge the bank with knowledge that the depositor is acting dishonestly. Batchelder *v.* Central National Bank, 188 Mass. 25, 73 N. E. 1024 (1905).

[8b] Duckett *v.* National Mechanics' Bank, *supra;* see also and *cf.* Duckett *v.* Bank, 88 Md. 8, 41 Atl. 161, 1062 (1898); Batchelder *v.* Central National Bank, 188 Mass. 25, 73 N. E. 1024 (1905).

[8b0] Parks *v.* Knickerbocker Trust Co., 137 App. Div. 719 (1910), 122 N. Y. S. 522.

[8ba] Allen *v.* Puritan Trust Co., 211 Mass. 409, 97 N. E. 916 (1912).

[8bb] Baker *v.* Baker, 123 Md. 32, 90 Atl. 776 (1914).

[8bc] Washburn *v.* Lee, 128 Wis. 312, 107 N. W. 649.

[8c] Sayre *v.* Weil, 94 Ala. 466, 10 So. 546 (1891), citing Wolffe *v.* State, 79 Ala. 206; Woods *v.* Legg, 91 Ala. 513, 8 So. 342; Swink's Adm'r *v.* Snodgrass, 17 Ala. 657.

from time to time deposited on the account, and he drew checks against the funds as treasurer and used the money for private purposes. *Held*, that the bank could not plead against the town's demand for its money so squandered, that it supposed the treasurer had authority to draw the notes. They must be considered personal loans to the depositor; and when he drew out money really belonging to the town to pay these notes, he did what the bank must be held to know he had no right to do, and it must refund the town.[9]

And if a bank receives from one of its customers a check drawn to the order of a town and indorsed in blank in the name of its treasurer, and pays out the proceeds thereof to such customer it is a conversion for which the bank is liable to the drawer of the check, since the form of indorsement is notice of defect of title.[9a] But a town or city treasurer has power to indorse to the bank at which a note of the town or city is made payable a certified check made payable to the town or city, in order to provide the bank with funds with which to pay the note;[9b] and a banker having no interest in the matter who pays out money on deposit on the fraudulent order of a city treasurer who, by the terms of the deposit, has a right to draw on the account is liable only when he is privy to the fraud of the depositor.[9c]

But advancing money to a trustee and then allowing him to pay the loan by the proceeds of trust property he has a right to sell, does not necessarily make the bank responsible, no circumstances being shown sufficient to put the bank on inquiry as to whether the money advanced was to be used for trust purposes or not.[10]

Where a fund deposited by K. in trust for D. is paid by the bank to K.'s administrator, in the absence of any notice from D. the payment discharges the bank.[10a]

[9] Town of East Hartford *v.* American National Bank, 49 Conn. 549.

[9a] Franklin Savings Bank *v.* International Trust Co., 215 Mass. 231, 102 N. E. 363 (1913); Quincy Mutual Fire Ins. Co. *v.* International Trust Co., 217 Mass. 370, 104 N. E. 845 (1913).

Where a bank, without inquiring, collects checks drawn by A. *Per proc.*, credits the proceeds to the private account of A. and pays them out on A.'s check it is liable to the true owner as for a conversion. Morrison *v.* London County etc. Bank, Ltd. (1914) 3 K. B. 356.

[9b] Brown *v.* First National Bank, 216 Mass. 298, 103 N. E. 780 (1914).

[9c] Newburyport *v.* First National Bank, 216 Mass. 304, 103 N. E. 782 (1914).

[10] Loring *v.* Brodie, 134 Mass. 469.

[10a] Schluter *v.* Bank, 117 N. Y. 125, 22 N. E. 572.

A bank is not bound to inquire into the propriety of any transfer between the account of an individual partner and the partnership fund. It must honor the check of any partner drawn against the firm deposit.[11] Of course the check must be signed in the firm name.

Checks of a firm drawn on funds held in trust and forwarded by mail to the owner of the funds before the firm's assignment for benefit of creditors, but which were not received until after the assignment, should be paid since the trust fund does not pass to the assignee for the benefit of creditors.[11a]

§ 318. **Forced Payment.** — If a bank has been forced to pay by an authority it could not question or resist, it will not have to repay the deposit to the depositor.[1]

§ 319. **Insanity of Depositor.** — If the bank pays in good faith, not knowing of the insanity of the depositor, it will be protected.[1] But the check of one who is adjudged insane by a court of competent jurisdiction is utterly void at its inception.[1a]

An agent's authority is not revoked by lunacy of his principal until this is judicially ascertained, and the bank may pay the agent till then.[2]

§ 319½. **Death of Depositor.** — If payment of a check given without consideration is paid by the bank after it knows of the death of the drawer, the bank is liable for such payment.[1]

§ 319 A. **Payment to Guardian.** — A guardian has no authority to draw funds from a bank where such funds are due to his ward as administratrix of an estate. If the bank makes the payment without an order of court it is liable to the ward.[1]

§ 319 B. **Order of Payment.** — The general rule in adjusting a running account between the bank and the depositor is that the first money paid in is the first money paid out.[1]

[11] Backhouse *v.* Charlton, 8 Ch. D. 444 (1878).

[11a] Dickinson *v.* First National Bank, 64 App. Div. 254 (1901), 72 N. Y. S. 6.

[1] § 318. Grivot *v.* Louisiana State Bank, 24 La. Ann. 265.

[1] § 319. Riley *v.* Albany Savings Bank, 36 Hun (N. Y.) 513.

[1a] American Trust & Banking Co. *v.* Boone, 102 Ga. 202, 29 S. E. 182 (1897).

[2] Wallis *v.* Manhattan Co., 2 Hall (N. Y.) 495.

[1] § 319½. Pullen *v.* Placer County Bank, 138 Cal. 169, 66 Pac. 740, 94 Am. St. Rep. 19 (1902).

[1] § 319 A. Ryan *v.* North End Savings Bank, 168 Mass. 215, 46 N. E. 620; Walker *v.* The State Trust Co., 40 App. Div. (Hun, N. Y.) 55 (1899).

[1] § 319 B. Reid *v.* Charlotteville National Bank, 159 N. C. 99, 74 S. E. 746 (1912).

§ 320. **Succession of Banks.** — Where an insolvent bank transfers its assets, name, and franchise to another corporation, the latter is responsible to the creditors of the former.[1] But when a bank does not surrender or forfeit its charter but simply quits business and transfers the accounts of its depositors to another bank from which it borrows money to pay its depositors, and pledges its assets as security for the money so borrowed, the second bank is not liable to the creditors of the first bank.[1a]

A savings bank succeeding to the business of another must pay the certificates of deposit of the latter,[2] and always where the business and funds of bank A. pass to bank B., B. is liable fully to the depositors of A.[3] in the absence of agreement of the depositors to the contrary.

When a bank accepts an assignment of all the assets and liabilities of another bank, and credits on its books the amount of a depositor's (D.) credit on the books of the assignor bank, D. becomes a depositor with the assignee bank, and his claim cannot be barred by the Statute of Limitations.[4]

And when the credit is held on the same terms that it was held in the other bank, if the bank pays and charges to the account of the depositor a note payable on the other bank and which the other bank has been instructed by the depositor not to pay, it is liable to the depositor for the amount of the unauthorized payments, and the bank cannot contend that it is a *bona fide* purchaser for value before maturity. Nor is the return of the note which the depositor had received with his cancelled checks a condition precedent to bringing suit. The transferee bank succeeded to the rights of the other bank and no additional rights, and it was bound to know the terms on which the deposit was held by its predecessor. In regard to deposits subsequently made, the implied understanding that the bank should pay the depositor's checks drawn on the account, and notes made by him payable at the bank did not include notes made long before payable at another bank.[5]

When a bank which is a successor to another bank whose charter

[1] § 320. Island City Savings Bank *v.* Sachtleben, 67 Tex. 420, 3 S. W. 733.

[1a] Overstreet *v.* Citizens' Bank, 12 Okla. 383, 72 Pac. 379 (1903).

[2] Citizens' Savings Bank *v.* Blakesley, 42 Ohio St. 645.

[3] Eans *v.* Exchange Bank, 79 Mo. 182; Hopper *v.* Moore, 42 Iowa 563.

[4] Green *v.* Odd Fellows' Bank, 65 Cal. 71, 2 Pac. 887.

[5] Elliott *v.* Worcester Trust Co., 189 Mass. 542, 75 N. E. 944 (1905).

expired by limitation and whose affairs are in process of liquidation sues to recover the proceeds of drafts fraudulently issued by a servant of the former bank, the defendant cannot collaterally attack the corporate integrity of the new bank on the ground that the transfer of the assets of the old bank to the new bank was invalid.[6]

When a depositor in a private bank knows that the bank has been sold to another he may refuse to accept the other as his debtor in place of the vendor or he may affirm the arrangements and look to the vendee to pay his deposit.[7]

If a bank which has voluntarily gone into the hands of a bank examiner turns over its assets to a new bank upon condition that the latter would care for the creditors and depositors of the former and the new bank contracted in writing to do so the new bank is liable to one who was a depositor in the old bank at the time of such transfer.[8]

Where a bank purchases the business and premises of a county bank and opens the premises as a branch bank there has been a succession to the business of the county bank.[9]

§ 320 A. **Unclaimed Deposits.** — The state may provide that deposits in a bank unclaimed for a certain length of time shall escheat to the state, and payment of such deposits to the state releases the bank from any liability for such deposits to the depositor.[1]

[6] Clifford Banking Co. *v.* Donovan Commission Co., 195 Mo. 262, 94 S. W. 527 (1906).

[7] Gillett *v.* Ivory, 173 Mich. 444, 139 N. W. 53 (1912).

[8] Miles *v.* Macon County Bank, 187 Mo. App. 230, 173 S. W. 713 (1914).

[9] Bell *v.* National Provincial Bank, (1904) 1 K. B. 149, reversing (1903) 2 K. B. 249.

[1] § 320 A. State *v.* First National Bank, 61 Or. 551, 123 Pac. 712, 1914B Ann. Cas. 153, n.; Attorney General *v.* Provident Inst. for Savings, 201 Mass. 25, 86 N. E. 912 (1909).

CHAPTER XXI

STATUTE OF LIMITATIONS

See § 301.

§ 322. Does not run against a general deposit until a right of action accrues, which is not until demand is made upon the bank, — it being a part of the contract of deposit implied by the uniform course of business that the bank is in no default in not seeking the creditor, but may hold the deposit until he demands it (unless the bank obtained the money by fraud, § 322 *e*), or circumstances arise making such demand useless, as,

(1) Suspension of payment by the bank.

(*e*) (2) Notice by an account stated, or otherwise, that the bank holds adversely, and will not pay.

But when one bank succeeds to the business and assets of another, the transfer does not set the statute running against the depositors in the expired bank. § 320.

Some slight opposition has been manifested to this view, but the overwhelming weight of authority, direct and by analogy, favors it.

(*c*) (1) As to special deposit, the same rule holds.

(*d*) (2) As to proceeds of collection, the same rule holds.

§ 322. **Statute of Limitations. — Suit by Depositor for his Balance.** — The indebtedness of the banker being an ordinary indebtedness at common law, the Statute of Limitations will run against it, as against any other simple debt. But when the statute will begin to run has not been as yet conclusively settled. In Union Bank *v.* Knapp,[1] it was said that the statute would begin to run from the date of the last balancing of accounts, as in the depositor's bank-book, if no subsequent transactions should be had between the parties. This is the strict corollary from the rule that the bank's liability to the depositor is a simple debt. But there is certainly room to argue that this calculation, from the date of the last transaction between the parties, is not founded either in reason or in sound law. Viewing it practically, the

[1] § 322. 3 Pick. (Mass.) 96; Grant on Bankers, etc. See also Pott *v.* Clegg, 16 M. & W. 321; Bridgman *v.* Gill, 24 Beav. 302.

longer the bank retains the money undisturbed, the better it is for the bank. If it has been allowed to reap extraordinary gains from the funds of a customer, because it has been allowed to retain them undisturbed for the unwonted space of eight, ten, or twelve years, this would seem to be no just cause for allowing it to add the still more enormous gain of a complete appropriation of the whole sum. If the business of the institution or firm is properly conducted, the depositor's balance will remain for any period as an open and live credit on the books of the bank; and therefore the depositor's draft for his principal, or any part of it, could never operate as an injurious surprise, as a like demand might do between individuals under ordinary circumstances. Such seems clearly to be the fair reason of the matter. The legal arguments and authorities which sustain it seem scarcely less than conclusive.

No Action until Demand, or Some Act Dispensing with It

The rule of the case above cited can be based only on the assumption that the contract is a perfectly simple one of unqualified indebtedness. But this is not so. We have already seen that it is a contract specially modified by the clear legal understanding that the money shall be forthcoming to meet the order of the creditor whenever that order shall be properly presented for payment. It follows, therefore, that this demand for payment is an integral and essential part of the undertaking, and, it may be said, even of the debt itself. In short, the agreement of the bank with the depositor, as distinct and valid as if written and executed under the seal of each of the parties, *is only to pay upon demand;* accordingly, until there has been such demand, and a refusal thereto, or until some act of the depositor, or some act of the bank made known to the depositor, has dispensed with such demand and refusal, the statute ought not to begin to run, nor should any presumption of payment be allowed to arise.

(*a*) Decisions fully sustain these views.

In Minnesota [2] and Illinois [3] demand is a prerequisite to the maintenance of an action for a general deposit unless circumstances exist amounting to a legal excuse, and the statute runs only from demand. In New York, Pennsylvania, Maryland, California, Georgia, and other States, the law is the same. The under-

[2] Branch *v.* Dawson, 33 Minn. 399 (1885).
[3] Brahm *v.* Adkins, 77 Ill. 263.

taking of the bank is not to pay immediately and absolutely, but when payment shall be required. It is in no default till payment is demanded. Therefore no right of action exists, and the statute does not run until demand is made as stipulated for in the implied contract of deposit.[4]

Demand Obligations

(*b*) Analogies of the law favor this view. The statute runs in favor of an indorser of a demand note only from the time of demand and notice, however long the demand may be postponed.[5]

(*c*) So in case of a contract to return securities left with a bank for safe keeping, the statute runs against the right of action for breach of the contract only from the time of demand, and not from the time of conversion.[6] If the action were for conversion,

[4] Downes *v.* Phœnix Bank, 6 Hill (N. Y.) 297; Adams *v.* Orange Co. Bank, 17 Wend. (N. Y.) 514; Girard Bank *v.* Bank of Penn Township, 39 Pa. St. 92; Planters' Bank *v.* Farmers & Mechanics' Bank, 8 Gill & J. (Md.) 449; Farmers & Mechanics' Bank *v.* Planters' Bank, 10 *id.*, 422 (decision based on banking usage); McGough *v.* Jamison, 107 Pa. St. 336; Bank *v.* Merchants' National Bank, 91 N. Y. 106; Thomson *v.* Bank, 82 N. Y. 1; Hales *v.* Seaman's Bank, 28 App. Div. (Hun, N. Y.) 407 (1898); Finkbone's Appeal, 86 Pa. St. 368; Humphrey *v.* County National Bank, 113 Pa. St. 417, 6 Atl. 155; Green *v.* Odd Fellows' Bank, 65 Cal. 71, 2 Pac. 887 (1884); Mitchell *v.* Beckman, 64 Cal. 117, 28 Pac. 110; Munnerlyn *v.* Augusta Bank, 88 Ga. 337, 14 S. E. 554 (1897); Smiths' Cash Store *v.* First National Bank, 149 Cal. 32, 84 Pac. 663, 5 L. R. A. (N. S.) 870 (1906); Patten *v.* American National Bank, 15 Colo. App. 479, 63 Pac. 424 (1900); Koelzer *v.* First National Bank, 125 Wis. 595, 104 N. W. 838, 110 Am. St. Rep. 870, 2 L. R. A. (N. S.) 571, n. (1905); Schinotti *v.* Whitney, 130 Fed. 780 (1904), citing Brown *v.* Pike, 34 La. Ann. 577; Citizens' Bank *v.* Fromholtz, 64 Neb. 284, 89 N. W. 775 (1902); Citizens' State Bank *v.* Worden, 95 Neb. 53, 144 N. W. 1064 (1914); Missouri Pac. Ry. Co. *v.* Continental National Bank, 212 Mo. 505, 111 S. W. 574, 17 L. R. A. (N. S.) 994 (1908); Clark *v.* Farmers' National Bank, 124 Ky. 563, 99 S. W. 674 (1907); Corbin Banking Co. *v.* Bryant, 151 Ky. 194, 151 S. W. 393 (1912).

In Louisiana a suit for a balance of deposit may be maintained where there is no plea of want of amicable demand accompanied by a tender of the balance due. McKnight *v.* Bank of Acadia, 114 La. 289, 38 So. 172 (1905).

If a bank pays a claimant out of money standing to the credit of a depositor and charges the customer the amount thus paid, he has a right of action for the amount appropriated without a previous demand. Jaselli *v.* Riggs National Bank, 36 App. Cas. (D. C.) 159, 1912C Ann. Cas. 119, n., 31 L. R. A. (N. S.) 763, n.

For facts amounting to demand, see Delahunty *v.* Central National Bank, 37 App. Div. (Hun, N. Y.) 434 (1899).

[5] Parker *v.* Stroud, 98 N. Y. 379.

[6] Ganley *v.* Troy City National Bank, 98 N. Y. 487.

the rule would be otherwise; no demand is necessary to maintain trover when the bank treats a special deposit as part of its assets.[7]

Proceeds of Note Left for Collateral

(*d*) Where a deposit of money is made in bank, the Statute of Limitations does not begin to run until after demand is made. So where a note as collateral security to a line of discounts is deposited in bank, and it is converted into money by the bank, the Statute of Limitations does not begin to run as to the proceeds of the note until after demand.

In such a case in Pennsylvania the court said: "It is a settled rule of law, that when a deposit is made in a bank the statute does not begin to run until after the demand is made. It is true, the defendant was not technically a depositor of money to be drawn out on his check, but we are unable to see any substantial difference between such case and the one in hand. He was a customer or dealer with the bank, was having a line of discounts, and the notes in controversy were deposited as collateral to such discounts. What was the duty of the bank when the collateral notes were paid? It was to deposit or carry the proceeds to the credit of the defendant's account. He would then occupy the position of any other depositor." [8]

Statute never Runs till Right of Action Accrues

(*e*) Further, in the case of a naked debt, the statute never begins to run before a right of action on behalf of the claimant or creditor has accrued. If this be a sound principle, it is conclusive of the present question. For debt though it be of the bank to the depositor, it is not such naked debt that it can be sued upon by the depositor at any moment. The authorities are numerous and overwhelming that the depositor's right of action does not come into existence until after he has made a demand upon the bank, which there was an implied and valid understanding between them in the outset that he should make,[9] or until some act of the

[7] First National Bank of Monmouth *v.* Dunbar, 19 Ill. App. 558 (1886).

[8] Humphrey *v.* County National Bank, 113 Pa. St. 417, 421, 6 Atl. 155.

[9] Downes *v.* Phœnix Bank, 6 Hill (N. Y.) 297; Adams *v.* Orange Co. Bank, 17 Wend. (N. Y.) 514; Johnson *v.* Farmers' Bank, 1 Harr. (Del.) 117; Girard Bank *v.* Bank of Penn Township, 39 Pa. St. 92; Union Bank *v.* Planters' Bank, 9 Gill & J. (Md.) 439; Watson *v.* Phœnix Bank, 8 Met. (Mass.) 217; Bellows Falls Bank *v.* Rutland County Bank, 40 Vt. 377; Masonic Benefit Ass'n *v.* First State Bank, 99 Miss. 610, 45 So. 408 (1911).

bank has waived such demand.[10] The duties of demand and of payment are reciprocal. Surely then the legal results of these rights should be reciprocal likewise. If the depositor cannot sue till he has demanded payment, *e converso* he should not lose his right to sue till the payment has been refused; for until that time he has a right to suppose that the original agreement between himself and the bank, which was entered into for their mutual advantage and profit, and from which his refraining from demand is enabling the bank to reap an unusually great advantage and large profit, is still subsisting in unbroken force.

Waiver of Demand

The acts which have been held to waive demand by the depositor are: 1. Notification to him by the bank that his claim will not be paid.[11] 2. The rendition to him by the bank of an account, in which it claims the money as its own.[12] 3. Suspension of specie payment and discontinuance of banking operations by the bank, with knowledge thereof by the depositor.[13] 4. Suspension of payment and closing the doors of the bank.[14]

[10] Farmers & Mechanics' Bank *v.* Planters' Bank, 10 Gill & J. (Md.) 422; Planters' Bank *v.* Farmers & Mechanics' Bank, 8 *id.*, 449; Bank of Missouri *v.* Benoist, 10 Mo. 519; Cooper *v.* Mowry, 16 Mass. 7; Masonic Benefit Ass'n *v.* First State Bank, 99 Miss. 610, 55 So. 408 (1911).

Paying money improperly upon checks drawn by a receiver without being countersigned according to order of court is a tort, and the statute of limitations begins to run immediately. American National Bank *v.* Fidelity etc. Co., 129 Ga. 126, 58 S. E. 867 (1907); but see American National Bank *v.* Fidelity etc. Co., 131 Ga. 854, 63 S. E. 622 (1909), holding that if the basis of the action is actual fraud the statute does not begin to run until notice of the fraud.

[11] Farmers & Mechanics' Bank *v.* Planters' Bank, *supra;* Masonic Benefit Ass'n *v.* First State Bank, *supra.*

See First National Bank *v.* Peck, 180 Ind. 649, 103 N. E. 643 (1913), denial of liability.

[12] Bank of Missouri *v.* Benoist, *supra;* Masonic Benefit Ass'n *v.* First State Bank, *supra.*

[13] Planters' Bank *v.* Farmers & Mechanics' Bank, *supra;* Schinotti *v.* Whitney, 130 Fed. 780 (1904).

[14] Cooper *v.* Mowry, *supra;* Board of Court House and City Hall Commissioners *v.* Irish-American Bank, 68 Minn. 470, 71 N. W. 674 (1897).

The appointment of a temporary receiver and his assumption of possession of the assets excuses a formal demand by the depositor. People *v.* Merchants' Trust Co., 116 App. Div. 41 (1906), 101 N. Y. S. 255; Sickles *v.* Herold, 149 N. Y. 332, 43 N. E. 852; Richmond *v.* Irons, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. 788.

New Acknowledgment

In Adams *v.* Orange County Bank,[15] the publication of a list of unclaimed deposits, made under the State statute requiring such publication at certain intervals, was held to be an acknowledgment of indebtedness to the depositors therein named, from which a new promise could be implied to prevent the running of the Statute of Limitations; and the court added, that it would seem that, if facts existed excusing payment, they should be noticed in such publication, or otherwise should be deemed to have been waived.

No Demand Necessary if the Bank Obtained the Money by Fraud

If the bank has obtained the money by fraud, or through an illegal contract, suit by the depositor lies at once, without demand. So where the money was paid in and a receipt taken from the cashier, stipulating that payment should not be made before a certain day, thus in fact transmuting the transaction into a loan to the bank, being a contract which in this instance the cashier had not power to enter into on behalf of the corporation, it was held that, since the contract was illegal and the bank could only claim to withhold the money from the owner by virtue of this illegal contract, it should not be entitled to a prior demand, but the owner might sue immediately.[16]

[15] 17 Wend. (N. Y.) 514.
[16] White *v.* Franklin Bank, 22 Pick. (Mass.) 181.

CHAPTER XXII

LIEN AND SET-OFF

See Lien on Shares. § 697 *et seq.*

A Lien

Is a mere right of the bank to retain in its possession (though in maritime law and in equity liens may exist independently of possession) property, the title of which (absolute or special) is, or in the case of negotiable paper purports to be, in one against whom the bank has some demand, until that demand is satisfied.

Liens are particular or general.

A Particular Lien

Attaches to a thing for a claim growing out of or connected with that particular thing, and is favored at common law as founded in equity.

A General Lien

Is a right of retention, not only for charges growing out of or connected with that particular thing, but also for charges in respect of all dealings between the parties of a like nature. Such liens are not favored.

§ 332. Creation.

Liens arise by express agreement, or from the course of business, and never exist where the terms of agreement, express or implied, are inconsistent with the lien.

§ 326. Effect.

A lien is good against the depositor, whether he is true owner of the property or not. § 699.

A lien upon non-negotiable property is good against the whole
§ 326. world, if the debtor is the true owner at the time the lien arises. Liens relate back to the beginning of possession,
§ 331. unless the bank has notice of intervening rights before parting with the consideration that creates the lien, wherefore an attaching creditor or a purchaser from the debtor takes it subject to the liens of the bank, arising before it has notice of the purchase or service of the attachment.

§ 324. A lien on negotiable property is good against all the world, if the bank takes it *bona fide* for value, without notice, and in the usual course of business.

§ 333. In New York, Pennsylvania, etc., a bank having possession

of paper which really does not belong to its debtor has no lien if it has not changed its position on faith of the paper, but merely holds it against a pre-existing general balance. But in most States a pre-existing debt is a sufficient consideration to constitute the bank a holder for value in the usual course of business. The New York exception is not recognized.

ON WHAT AND FOR WHAT THE LIEN ATTACHES.

§ 324. A bank has a general lien upon all moneys and negotiable securities of the depositor in its hands, in the regular course of business, unless there is an agreement to the contrary, or the bank has notice of facts indicating that the intent of the depositor in making or appropriating the deposit is inconsistent with such lien.

Under this principle, a bank has a lien for its general balance upon business paper placed with it for collection, and

On the proceeds of such collections.

On goods, bonds, deeds etc., upon the faith of which it has made advances, it has a particular lien.

§ 324. (*c*) But it has no general lien on securities left with it after it has refused to lend money on them.

§ 325. Nor on bills left to be exchanged.

(*a*) Or on the surplus proceeds of collaterals sold.

(*b*, *d*) Nor on any moneys deposited for a special purpose.

(*c*) Nor on a special deposit.

§ 326. The property and the claim that is the basis of the lien must

(*c*, *d*) be due to and from the same funds. (The property of A. cannot be held for a debt due from A. as administrator or trustee, or from the firm to which A. belongs, nor can the bank keep A.'s property for a debt due from A., unless it is due to the bank.)

This must be actually true in case the property is non-negotiable; but in case of negotiable property, the bank may presume that it belongs to the depositor, unless it has notice to the contrary. If the bank is aware that the property is not that of the depositor, it can only hold it for a claim against him who is really entitled to it, and not against a third person whom it supposes to be the owner.

§ 327. Appropriation of deposits.

(*e*) If there are several accounts in different branches of the bank, or in the same branch, which are really kept by the same depositor in the same right, the bank may apply a deposit in any one to satisfy an overdraft on any other, and if a depositor does not apply his deposit himself, the bank may appropriate it, even to a claim

(*d*) barred by the Statute of Limitations.

§ 328. Money received by a depositor for the use of the bank, but not paid over, may be charged against him on general account, and in equity the bank may retain a deposit for an

§ 329. Unmatured debt.

As for a note of the depositor, if there is otherwise danger of loss, as by the depositor's insolvency, though at law there cannot be a lien or set-off of a future debt against a present demand, except by agreement. § 702.

§ 330. Loss of lien.

Lien may be lost by taking security for the debt, voluntarily parting with possession, etc. § 701.

§ 331. Estoppel.

The bank may, by bad faith, be estopped to assert a lien that would ordinarily exist.

(*a*) And as to a purchaser, a bank cannot set up a lien for advances made after it knew of the purchase.

SET-OFF. (See Set-off of bank bills, §§ 633, 639.)

Is a defence to a demand by setting up an opposing demand to counterbalance it in whole or in part.

§ 334. The demands must be run between the same two real funds.

§ 335. They must be certain, or capable of being reduced to certainty, by computation.

(This excludes demands for damages, the amount of which a jury must determine by their own estimate and opinion, and not merely by calculation, in case they deem the claim a good one.)

§ 336. The demands must be money demands.

Goods intrusted to the bank for any purpose but to be turned into a money credit are not the subject of set-off.

§ 336 *a*. Certified check not subject to set-off by bank.

§ 337. INSOLVENCY,

Of depositor.

The bank may retain his deposit to satisfy, so far as it will go, his indebtedness to it, and if any part of its claims arising out of contract are unliquidated (as in case of notes on which the depositor was indorser and the principals are insolvent), it may keep the deposit till the probable debt is ascertained.

§ 338. Of a commercial bank.

The depositor may offset his deposit or other debt due from the bank against a debt due from him, though it matures after the insolvency.

But if his claim against the bank came into his hands after the insolvency, he will be allowed only what he paid for it, except under statute law.

§ 339. Of a savings bank.

Depositor cannot offset his deposit after insolvency of the bank.

§ 339. A. Of a savings and loan association.

§ 340. DEATH OF DEPOSITOR.

The bank may offset against his representatives just as against him.

COMPARISON OF LIEN AND SET-OFF.

(1) Set-off is a statute creation (except in equity), while liens exist at common law.

(2) A lien at common law requires the possession by the bank, actually or constructively, of the property of another, while set-off has nothing to do with the possession of any specific property to which the debtor has title.

(3) A lien gives a right to retain specific articles of property, the title to which is not in the retainer, while set-off can never give a right to retain property owned by another.

(4) It is clear, therefore, that the word "lien" cannot properly be used in reference to the claim of the bank upon a general deposit, for the funds on general deposit are the property of the bank itself. The term "set-off" should be applied in such cases, and "lien" when a claim against paper or valuables on special or specific deposit is referred to.

In the cases, the words are used very loosely, and sometimes the true force of a case has been mistaken by text-writers through failure to keep in mind this distinction.

The practical effect of lien and set-off is much the same. They result in balancing opposing claims, and since transfers of a general deposit are subject to the equities between the bank and the depositor, until notice to the bank, its right of set-off is as good in respect to a general deposit as its lien in respect to a specific deposit for collection or as collateral.

§ 324. **On what the Lien attaches and for what Demands.** — The rule may be broadly stated, that the bank has a general lien on all moneys and funds of a depositor [0] in its possession for the balance of the general account.[1] Of course, so long as the bal-

[0] § 324. Bankers cannot claim a banker's lien except upon the customer's own property. Cuthbert *v.* Robarts etc. Co., (1909) 2 Ch. 226; and funds coming into the possession of the bank after the death of the depositor cannot be treated as the customer's money, Padgett *v.* Bank of Mountain View, 141 Mo. App. 374, 125 S. W. 219 (1910).

[1] Ford *v.* Thornton, 3 Leigh (Va.) 695; State Bank *v.* Armstrong, 4 Dev. (N. C.) 519; McDowell *v.* Bank of Wilmington, 1 Harr. (Del.) 369; Commercial Bank of Albany *v.* Hughes, 17 Wend. (N. Y.) 94; Dawson *v.* Real Estate Bank, 5 Pike (Ark.) 283; Bank of United States *v.* Macalester, 9 Barr (Pa.) 475; Beckwith *v.* Union Bank, 4 Sandf. Super. (N. Y.) 604; Marsh *v.* Oneida Bank, 34 Barb. (N. Y.) 298; Davis *v.* Bowsher, 5 Term 488; Jourdaine *v.* Lefevre, 1 Esp. N. P. 66; Bolton *v.* Puller, 1 B. & P. 539; Giles *v.* Perkins, 9 East 12; Scott *v.* Franklin, 15 East 428; Brandao *v.* Barnett, 12 Cl. & F. 787; Jones *v.* Peppercorne, 5 Jur. N. S. 140; 28 L. J. Ch. 153; *In re* Williams, 3 Ir. Eq. 346; Buffalo County Bank *v.* Hanson, 34 Neb. 455, 51 N. W. 1035 (1892); Gibbons *v.* Hecox, 105 Mich. 509, 63 N. W. 519; People's Bank *v.* Tufts, 35 Atl. 792 (1896); Jones *v.* Merchants' National Bank, 72 Hun (N. Y.) 344; London Chartered Bank *v.* White, 4 App. Cases 413; Rice *v.* National Bank, 77 Mich. 414, 56 N. W. 776; Merchants' National Bank *v.* Maple, 65 Ill. App. 484; Bank *v.* Brewing Co., 50 Ohio St. 151, 33 N. E. 1054 (1893); Mt. Sterling National Bank *v.* Green, 99 Ky. 262, 35 S. W. 911 (1896); Garrison *v.* Union Trust Co., 139 Mich. 392, 102 N. W. 978, 111 Am. St. Rep. 407, n. (1905); Records *v.* McKim, 115 Md. 299, 80 Atl. 968 (1911); Wagner *v.* Citizens' Bank, 122 Tenn. 164, 122 S. W. 245, 135 Am. St. Rep. 869, 28 L. R. A. (N. S.) 484, n. (1909); Hiller *v.* Bank of Columbia, 92 S. C. 445, 75 S. E. 789 (1912); First National Bank *v.* City National Bank, 102 Mo. App. 357, 76 S. W. 489 (1903); Wilson *v.* Farmers' First National Bank, 176 Mo. App. 73, 162 S. W. 1047 (1914); Sachs *v.* Sachs, 181 Ill. App. 342 (1913); Manitou *v.* First National Bank, 37 Colo.

ance is in favor of the depositor, the lien has no vitality in it.[1o] But when payment upon an overdraft, a discount, an acceptance, or other species of advance or loan by the bank to him, creates an indebtedness on his part, all the funds which the bank has or obtains to his credit may be applied upon such indebtedness until it is fully discharged, and without any request or direction from him.[1a]

A bank which becomes assignee of a lessor and has in its possession securities of the lessee, has not a lien upon such securities for rent, and cannot apply collection thereon to the payment of rent without the lessee's consent.[1b]

The funds thus applicable have been said to be not alone the gen-

344, 86 Pac. 75 (1906); Bank of Lawrenceville *v.* Rockmore, 129 Ga. 582, 59 S. E. 291 (1907); Smith *v.* Sanborn State Bank, 147 Iowa 640, 126 N. W. 779 (1910); Padgett *v.* Bank of Mountain View, 141 Mo. App. 374, 125 S. W. 219 (1910).

The funds include money which has been paid into the bank by a vendee of property to the credit of the vendor as part payment of the purchase price of property, even though the vendee subsequently rescinds the contract. Blair *v.* Baird, 43 Tex. Civ. App. 134, 94 S. W. 116 (1906).

In South Carolina if the bank fails to notify the depositor that it has applied his funds to the extinguishment of past due claims it is liable to him for dishonoring his check. Callaghan *v.* Bank of Anderson, 69 S. C. 374, 48 S. E. 293 (1904).

The general rule does not apply when the money comes into the bank through inadvertence or mistake and without laches on the part of the owner. McLennan *v.* Farmers' Savings Bank, 131 Iowa 696, 109 N. W. 291, 117 Am. St. Rep. 439 (1906); Mingus *v.* Bank of Ethel, 136 Mo. App. 407, 117 S. W. 683 (1909); Wilson *v.* Farmers' First National Bank, 176 Mo. App. 73, 162 S. W. 1047 (1914).

A lien cannot be asserted upon a fund in a borrower's hands which at an earlier stage might have been subjected to it, if by consent of the claimant it has become part of the borrower's general estate. National City Bank *v.* Hotchkiss, 231 U. S. 50, 58 L. ed. 115, 34 Sup. Ct. 20 (1913).

The right to detain depositor's money for a general balance may be controlled by a special agreement. Furber *v.* Dane, 203 Mass. 108, 89 N. E. 227 (1909); First Denton National Bank *v.* Kenney, 116 Md. 24, 81 Atl. 227, 1913B Ann. Cas. 1337, n.

[1o] The word "lien" is inaptly applied to a general deposit in a bank which is the property of the bank itself. Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228 (1910); Davenport *v.* State Banking Co., 126 Ga. 136, 54 S. E. 977, 115 Am. St. Rep. 68, n. (1906); Luthersville Banking Co. *v.* Hopkins, 12 Ga. App. 488, 77 S. E. 589 (1913). See also Furber *v.* Dane, 203 Mass., 108, 89 N. E. 227 (1909).

[1a] Knapp *v.* Cowell, 77 Iowa 528, 42 N. W. 434; Globe Savings Bank *v.* National Bank, 64 Neb. 413, 89 N. W. 1030 (1902); Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228 (1910); Tallapoosa County Bank *v.* Wynn, 173 Ala. 272, 55 So. 1011 (1911); Commonwealth *v.* Wathen, 126 Ky. 573, 104 S. W. 364 (1907).

[1b] Buffalo County Bank *v.* Hanson, 34 Neb. 455, 51 N. W. 1035 (1892).

eral deposit of the customer, but any business paper, as notes or bills, belonging to him and which he has intrusted to the bank for collection,[2] and dividends which come into its hands.[2a]

Upon precisely what property belonging to the customer in the possession of the bank the lien will attach, is a subject upon which there have been few decisions in America. In Alabama it is held that a bank has a lien upon all moneys and securities of a customer, coming into its possession in the regular course of business,[2b] for any balance due it on general account.[3]

In Iowa a lien given by Rev. Sts. 1887 and 3448 on all property of the customer in the hands of the bank covers property taken only in the ordinary course of business and does not include property that cannot conveniently pass into the actual possession of the bank.[3a]

A bank may set off a deposit of a customer against an indebtedness due from him to an indorser.[3a]

When a customer deposits with a bank securities to cover overdrafts not exceeding a specified amount, the bank's general lien is displaced and the bank cannot hold the securities for overdrafts exceeding the specified amount.[3b]

When a bank which is a purchaser for value of time acceptances learns that the acceptor thereof has a defence it may set off

[2] *Ex parte* Pease, 1 Rose 232; *Ex parte* Wakefield Bank, 1 *id.*, 243; 19 Ves. Jr. 25; but see Lord Bolingbroke's Case, in Joy *v.* Campbell, 1 Sch. & Lef. 346; Cockrill *v.* Joyce, 62 Ark. 216, 35 S. W. 221 (1896).

[2a] Simpson *v.* Thompson, 43 Tex. Civ. App. 273, 95 S. W. 94 (1906).

[2b] A bank has no lien on money obtained as a result of mistake. Mingus *v.* Bank of Ethel, 136 Mo. App. 407, 117 S. W. 683 (1909); Wilson *v.* Farmers' First National Bank, 176 Mo. App. 73, 162 S. W. 1047 (1914).

[3] Lehman *v.* Tallassee Manuf. Co., 64 Ala. 567; *In re* Tallassee & Co., 64 Ala. 595. But if the depositor has obtained the money by fraudulent representations which authorize a recision of the contract under which it is paid the bank can have no lien thereon unless it has appropriated the deposit to the payment of its claim before it receives notice of another's right thereto. Batson *v.* Alexander City Bank, 179 Ala. 490, 60 So. 313 (1912). See also Matter of McElheny, 91 App. Div. 131 (1904), 86 N. Y. S. 326.

[3a] *In re* Gesas, 146 Fed. 734 (1906).

[3a] Van Winkle Gin Co. *v.* Citizens' Bank, 89 Tex. 147, 33 S. W. 862 (1896).

[3b] Earl of Strathmore *v.* Vane, 33 Ch. Div. 586; First National Bank *v.* Germania Safety etc. Co., 112 Ky. 734, 66 S. W. 716 (1902).

The lien attaches upon securities and money of the customer deposited in the usual course of business for advances which are supposed to have been made upon their credit. Furber *v.* Dane, 203 Mass. 108, 89 N. E. 227 (1909).

the funds of the payee on deposit at the time such acceptance fell due.[3c]

A bank which holds warrants of a town that are subject to call and payment, may, when the town notifies it that they will not be paid, apply funds in its hands belonging to the town in payment of the warrants.[3d]

Discount on Faith of Goods

(*a*) A bank discounting a draft on faith of goods shipped by the drawer acquires an equitable lien on the proceeds of the goods.[4]

Proceeds of Collection

(*b*) A bank holding a depositor's demand note has a lien on the proceeds of drafts, though collected after the filing of a petition in bankruptcy.[5]

No Lien on Securities in Bank's Possession Accidentally, not in Course of Business

(*c*) A bank has no lien for a general balance upon securities accidentally in its possession or not in its possession in the course of business as a bank, for example, securities left with the bank after its refusal to discount them or lend money on them.[6]

Symbolical Pledge

(*d*) It is a necessary condition of a symbolical pledge by delivery of bills of lading, warehouse receipts, etc., that the property itself be in the possession of some other person than the pledgor, and that it be separated, capable of identification.[7]

[3c] Johnson Co. Sav. Bank *v.* Renfro, 57 Tex. Civ. App. 160, 122 S. W. 37 (1909).

[3d] Manitou *v.* First National Bank, 37 Colo. 344, 86 Pac. 75 (1906).

[4] Flour City National Bank *v.* Garfield, 30 Hun (N. Y.) 579.

[5] *In re* Farnsworth, Brown & Co., 5 Biss. 223.

[6] Petrie *v.* Myers, 54 How. Pr. (N. Y.) 513; Lucas *v.* Dorrien, 7 Taunt. 278; s. c. 1 Moore 29; First National Bank *v.* Gatton, 172 Ill. 625, 50 N. E. 121 (1898); Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802 (1888), citing Rose *v.* Houston, 11 Tex. 324; Chapman *v.* Allen, 15 Tex. 278; King *v.* Gilleland, 60 Tex. 271; Glassock *v.* Hamilton, 62 Tex. 143; First National Bank *v.* Cleland, 36 Tex. Civ. App. 478, 82 S. W. 337 (1904).

[7] Union Trust Co. *v.* Trumbull, 137 Ill. 146, 27 N. E. 24.

§ 325. **Specific and Special Deposits.** — Any special purpose attaching to the deposit inconsistent with a general lien will prevent it, as giving bills to a banker to exchange for others.[1] Money deposited under an agreement, understood by the cashier, and intended to benefit all creditors, cannot be retained by the bank as an offset against its claims upon the depositor.[1a] So where securities are pledged for a particular loan or debt, the banker has no lien on them to secure payment of a general balance, or of other demands and indebtedness,[2] unless there is a special agreement to that effect.[2a] And this is true even where collaterals are allowed to remain in the bank after the debt secured by them is paid.[2b] So, if a check is deposited to take up the check of another person, the bank cannot apply it to satisfy the depositor's debt to the bank.[3]

[1] § 325. Barnett *v.* Brandao, 12 Clark & Fin. 787, 805, 809; Fitzgerald *v.* State Bank, 64 Minn. 469 (1896); Armstrong *v.* Chemical National Bank, 41 Fed. 234; First National Bank *v.* Germania Safety etc. Co., 112 Ky. 734, 66 S. W. 716 (1902); Wagner *v.* Citizens' Bank etc. Co., 122 Tenn. 164, 122 S. W. 245, 135 Am. St. Rep. 869, 28 L. R. A. (N. S.) 484, n. (1909); Ballard *v.* Home National Bank, 91 Kan. 91, 136 Pac. 935 (1913); *In re* Davis 119 Fed. 950 (1903); Eshbach *v.* Byers, 164 Ill. App. 449 (1911); Furber *v.* Dane, 203 Mass. 108, 89 N. E. 227 (1909); Hanover National Bank *v.* Suddath, 215 U. S. 110, 54 L. ed. 115, 30 Sup. Ct. 58 (1909).

[1a] Fitzgerald *v.* State Bank, 64 Minn. 469, 67 N. W. 361; Lyman *v.* Belfast National Bank, 98 Me. 448, 57 Atl. 799 (1904); Walters National Bank *v.* Bantock, 41 Okla. 153, 137 Pac. 717, 1915C L. R. A. 531.

[2] Wyckoff *v.* Anthony, 90 N. Y. 442; and see Davis *v.* Bowsher, 5 Term 491; Duncan *v.* Brennan, 83 N. Y. 487; Robinson *v.* Frost, 14 Barb. (N. Y.) 536; Lane *v.* Bailey, 47 Barb. (N. Y.) 395; Woolley *v.* Louisville Banking Co., 81 Ky. 527 (1884); Teutonia National Bank of New Orleans *v.* Loeb, 27 La. Ann. 110 (1875); Reynes *v.* Dumont, 130 U. S. 354, 32 L. ed. 934, 9 Sup. Ct. 486 (1889); Masonic Savings Bank *v.* Bangs, 84 Ky. 140 (1886); Loyd *v.* Lynchburg National Bank, 86 Va. 694, 11 S. E. 104 (1890); Furber *v.* Dane, 203 Mass. 108, 89 N. E. 227 (1909).

[2a] Merchants' Bank *v.* Denmere, 92 Ga. 739, 19 S. E. 38 (1893); Loyd *v.* Lynchburg National Bank, 86 Va. 694, 11 S. E. 104 (1890).

[2b] Bacon's Adm'rs *v.* Bacon's Trustees, 94 Va. 686, 27 S. E. 576 (1897).

[3] Straus *v.* Tradesmen's National Bank, 36 Hun (N. Y.) 451; National Bank *v.* Insurance Co., 104 U. S. 54, 26 L. ed. 693; Continental etc. Bank *v.* Chicago etc. Trust Co., 199 Fed. 704 (1912); Smith *v.* Sanborn State Bank, 147 Iowa 640, 126 N. W. 779, 140 Am. St. Rep. 336, 30 L. R. A. (N. S.) 517 (1910); Dolph *v.* Cross, 153 Iowa 289, 133 N. W. 669 (1911).

If notes are sent to a bank for discount and credit a general lien in favor of the bank cannot attach to them; and the bank is not justified in retaining the notes as a lien under an agreement giving it a general lien on all securities deposited by the sender. Hanover National Bank *v.* Suddath, 215 U. S. 110, 54 L. ed. 115, 30 Sup. Ct. 58 (1909).

Surplus from Sale of Collateral

(*a*) And if a bank sells collateral security, and there is a surplus of proceeds after the debt secured is paid, the surplus cannot be applied on general balance.[4]

Where a note is pledged by a bank to another bank to secure a loan, and the maker being threatened with suit pays said note to the pledgee without being allowed to set off a deposit to his credit in the pledgor bank, the maker is equitably entitled to recover, in preference to general creditors, from a receiver of the pledgor bank, who holds surplus of collaterals in excess of debt secured to the pledgee, the amount of such deposit which the maker would have been allowed to set off had the original bank retained the note.[4a]

No General Lien if Bank has Notice of Facts Inconsistent with it, as a Special Purpose in the Deposit

(*b*) In Bank of United States *v.* Macalester [5] the general rule was laid down that funds deposited in a bank for a special purpose, known to the bank, cannot be withheld from that purpose, to the end that they may be set off by the bank against a debt due to it from the depositor. Accordingly, certain coupons of the State bonds, issued by the State of Illinois, having been made payable at the Bank of the United States, and funds to precisely the amount necessary to meet these coupons having been deposited by the State in the bank just before they fell due, it was held that the bank, understanding the purpose of the deposit, could not refuse to apply the money to the payment of the coupons on the ground of a prior undischarged indebtedness of the State to the bank. The same general rule is laid down by Grant in his English Treatise, p. 372. He says that the claim of a general lien by the bank would be inconsistent with its special undertaking. The

[4] Brown *v.* New Bedford Savings Inst., 137 Mass. 262; Wolstenholm *v.* Sheffield Union Banking Co., 54 Law T. R. N. S. 746; Hathaway *v.* Fall River National Bank, 131 Mass. 14; Appl. of Bank of Commerce, 44 Pa. St. 423.

[4a] Becker *v.* Seymour, 71 Minn. 394, 73 N. W. 1096 (1898).

Where A. promises the bank to deposit $1000 in the bank and to leave it there until the debt of B. to the bank is paid the deposit becomes a pledge and gives the bank a lien thereon until the note should be paid. Thompson *v.* Hazelwood Trust Co., 234 Pa. St. 452, 83 Atl. 284 (1912).

[5] 9 Barr (Pa.) 475. See Van Zandt *v.* Hanover National Bank, 149 Fed. 127 (1906).

reasoning in the above case, however, and that in Mr. Grant's work, both tend to show, though it is not directly stated, that if the deposit were so made that the bank did not, as matter of fact, know, or at least did not have such strong cause that it could not reasonably insist that it did not know, that the deposit was intended to meet the special purpose, and that it could not therefore be subjected to the lien, then the lien might attach. For if the bank had not such knowledge, or ample means of obtaining such knowledge, it may well be urged, that, with an unpaid indebtedness to the customer to the bank already subsisting, it would refuse to have further dealings with him, if they were to be of such a qualified and unusual nature.

The English cases eliminate from the operation of the lien all property which comes into the banker's hands plainly ear-marked or appropriated for any special purpose. A customer's security, specifically stated to be for the amount "which shall or may be found due on the balance of his account", was held to be security for the then existing balance only, and not to be applicable upon the subsequent floating balance.[6] In like manner, a security specifically given for a contemporaneous advance of one thousand pounds by the banker, was held not to be applicable against an independent indebtedness of five hundred pounds, afterwards arising upon the ordinary running account.[7]

Special Deposit

(*c*) It seems, too, that the deposit should be made with the banker in his character as such, and should not be in the nature of a special deposit for a particular purpose not connected with the banking business. Thus, for example, a chest of plate confided to the banker, not as a banker but as a custodian, merely for safe custody in his vaults, was held not subject to the lien.[8]

Specific Deposit cannot be Appropriated to Debt of the Depositor to Bank

(*d*) Money deposited for a specific purpose must be applied to that and no other. Where a State had two deposits in a bank, one to pay coupons and bonds issued by the canal commissioners,

[6] *In re* Medewe, 26 Beav. 588; 28 L. J. Ch. 891.
[7] Vanderzee *v.* Willis, 3 Bro. C. C. 21; Zinck *v.* Walker, 2 W. Bl. 1154.
[8] *Ex parte* Eyre, 1 Ph. 235; Brandao *v.* Barnett, 12 Cl. & F. 809; O'Connor *v.* Majoribanks, 4 Man. & G. 435.

the other under control of the fund commissioner, the latter being overdrawn, the bank applied the former deposit to settle the deficit. *Held*, that this could not be done by the bank; it was the agent of the coupon holders to the extent of the sum set apart for their payment.[9]

§ 326. **The opposing Claim and the Property must be due to and from the same two Funds.** — The lien and the right of set-off only exist where the individual, who is both depositor and debtor, stands in both these characters in precisely the same relation and on precisely the same footing towards the bank. That is to say, for instance, the bank can claim no lien on the deposit of a partner, made on his separate account, in order to set off the same against a debt owing them from the firm;[1] and this not even if property specifically pledged to the bank by the partner on his separate account afterwards becomes the property of the firm. Even then, if the firm fails, the banker can hold the property thus pledged solely as security for any separate indebtedness of the individual partner.[2] For it is not in the bank's possession as the property of the firm; so far as the firm is concerned the bank's possession is accidental. And the surplus above the indebtedness of a firm cannot be applied by the bank to the individual debt of a partner without the consent of the partner.[2a] Neither can the individual partner and the firm so shift their respective credits and debits as to set them off, the one against the other, when the bank itself is insolvent.[3] When a bank makes a loan to a partner in the firm name, on the authority of the firm, with a knowledge that such a loan is to be used to pay an individual indebtedness to the bank, the firm is not bound.[3a] In like manner, it has been held that the joint and several note of A. as principal, and B. and C. as sureties, cannot be paid out of the individual deposit even of A.[4]

But later decisions hold that the bank may apply the amount credited to a depositor to a debt due to it by such depositor jointly with another.[4a]

[9] Judy *v.* Farmers & Traders' Bank, 81 Mo. 404.

[1] § 326. Watts *v.* Christie, 11 Beav. 546.

[2] *Ex parte* McKenna, 30 L. J. Bank 20.

[2a] Bank of Grange *v.* Cotter, 101 Ga. 134, 28 S. E. 644 (1897); Bank of Lawrenceville *v.* Rockmore, 129 Ga. 582, 59 S. E. 291 (1907).

[3] Watts *v.* Christie, 11 Beav. 546; 26 L. J. Ch. 711.

[3a] Eyrich *v.* Capital State Bank, 67 Miss. 74 (1889).

[4] Dawson *v.* Real Estate Bank, 5 Pike (Ark.) 283.

[4a] Eyrich *v.* Capital State Bank, 67 Miss. 71, 6 So. 615 (1889), citing Moody *v.* Willis, 41 Miss. 347.

The decision in Dawson *v.* Bank [4] was based on two grounds — one that the charter of the bank prohibited such set-off, the other because the debts were not mutual. On the latter ground this decision followed Trammell *v.* Harrell [4b] which was overruled by Leach *v.* Lambeth.[4c]

So, also, a bank with which certain notes belonging to A. and B. as co-owners are left for collection has a lien on A.'s half of said notes for any balance due to it from A. on general account.[4d]

The funds of a corporation cannot be applied to the individual debt of the corporation's president.[4e]

Money deposited by a person to the credit of himself, as "deputy treasurer", cannot be applied by the bank to the payment of an overdraft by another person, as "county treasurer." [4f]

A bank which has received money on deposit for an agent who has a beneficial interest therein cannot disregard that interest and apply the money to a debt due to it from the agent's principal.[4g]

In the first case cited in this paragraph, the facts were these. The bankers stopped payment, being at the time indebted to A., but having a balance due from the firm of A. and B. Before they had actually committed an act of bankruptcy, A. assigned his credit to the firm, and notified the bankers. But it was held that the assignment could not be legally made. In short, it may be laid down as a general rule, based upon and illustrated by many of the cases cited and commented upon in this and the immediately preceding paragraphs, that, if a customer has any duplex relationship with his banker, the line of demarcation shall be carefully preserved. If he borrows a specific sum, and gives specific security for it, all transactions relating thereto shall be kept accurately distinct from the transactions growing out of his ordinary connection with the bank, as a simple depositor.[5]

Trust Account

(*a*) If the same person keeps separate accounts at the same bank in distinct characters, the one being his individual account,

[4b] 4 Ark. 602.
[4c] 14 Ark. 668.
[4d] Greene *v.* Jackson Bank, 18 R. I. 779, 30 Atl. 963.
[4e] Ferry *v.* Home Savings Bank, 114 Mich. 321, 72 N. W. 181 (1897).
[4f] Citizens' National Bank *v.* Alexander, 120 Pa. St. 476, 14 Atl. 402.
[4g] Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804 (1901).
[5] Moose *v.* Salt, 32 Beav. 269; 32 L. J. Ch. 756.

and the other being kept by him under any species of trust, if the bank has notice of the nature of this second account, it will be bound to keep the two distinct. If the bank wrongfully permits the depositor to intermingle the accounts, or to make transfers from the trust account to his personal account, when in fact he had no right so to do, it may possibly render itself liable to reimburse the beneficiary or principal who has been unjustly stripped of his property; in which case, if the customer has drawn against his own account, so that his balance no longer furnishes means of remuneration to the bank, it will have no recourse but to bear the loss.[6] The decision in this case was based upon the ground that the bankers had actual cognizance of the circumstances which rendered the conduct of their customer fraudulent; and so were, in the view of the law, privy to the fraud. Where the circumstances fail to show real or implied knowledge of this description on the part of the bank, the reason of this cause would not reach.

(*b*) Where a bank knew that the account of a depositor was opened by him as general agent, to facilitate his business as agent of an insurance company, by accumulating premiums on policies, — *held*, that the bank was chargeable with notice of the equitable rights of the company, although he deposited other money in the same account and drew checks upon it for his private use; and the company might enforce its beneficial ownership therein against the bank, claiming a lien thereon for a debt due to it which he contracted for his individual use.[7]

(*c*) The deposit and the debt must be due to and from the same fund. A bank cannot keep a deposit made by D. as assignee, for D.'s individual debt.[8]

Funds of Principal not Applicable to Agent's Debt

Where an agent deposits money of his principal in his own name as "agent", the bank knowing the trust character of the funds cannot appropriate them to the individual debt of the agent, even with his consent, to the prejudice of the principal.[9] So where

[6] Bodenham *v.* Hoskins, 13 Eng. L. & Eq. 222.

[7] Central National Bank *v.* Conn. Mut. Life. Ins. Co., 104 U. S. 54, 26 L. ed. 693 (1881); Globe Savings Bank *v.* National Bank, 64 Neb. 413, 89 N. W. 1030 (1902).

[8] Lawrence *v.* Bank of Republic, 35 N. Y. 320.

[9] Baker *v.* New York National Exchange Bank, 100 N. Y. 31, 2 N. E. 452.

funds are deposited in the name of "J. C. W., Trustee", the bank cannot apply them to a debt due from J. C. W.[10]

But if a check is drawn payable to "W. H. D. Atty." is indorsed by "W. H. D." and deposited this does not necessarily inform the bank that the money is trust money and so it may be applied to a debt due from "W. H. D." unless the bank has knowledge that it is trust money.[10a]

Overdraft of Old Firm

(*d*) A bank cannot apply the funds of a new partnership to settle the overdraft of the old firm now dissolved, though one of the two partners in the old firm continues in the business.[11]

But the bank may apply a deposit, made by a surviving partner, in behalf of an insolvent firm, to an indebtedness of the firm to the bank.[11a]

On Money of C. in the Possession of B., and Deposited in the Name of A., Bank has no Lien for B.'s Debt, though it Thought the Money was B.'s

(*e*) A firm finding itself in embarrassed circumstances deposited a certain sum in the bank with which it was accustomed to do business, but made the deposit in the name of the book-keeper of the firm. The sum in question was due to persons for whom the depositing firm acted as agents. The bank had knowledge that the deposit, though in the name of the book-keeper, was of money of the firm, but did not know that it was of money which the firm had received in the course of an agency. It was held that the bank had no lien on this deposit for indebtedness of the firm to it.[12] In order to apply money deposited in A.'s name to the debt of B., the bank must show not only that it is not A.'s money, but that it is actually the money of B.[12a]

[10] Bundy *v.* Town of Monticello, 84 Ind. 119 (1882). See Indiana Trust Co. *v.* International Building Ass'n, 165 Ind. 597, 76 N. E. 304 (1905); State Bank *v.* McCabe, 135 Mich. 479, 98 N. W. 20 (1904).

[10a] First Denton National Bank *v.* Kenney, 116 Md. 24, 81 Atl. 227, 1913B Ann. Cas. 1337, n. (1911).

[11] Richardson *v.* International Bank, 11 Ill. App. 582.

[11a] Hodgin *v.* People's National Bank, 124 N. C. 540, 32 S. E. 887 (1899).

[12] Falkland *v.* St. Nicholas National Bank, 84 N. Y. 145. See Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804 (1901).

[12a] Thomas *v.* Exchange Bank, 99 Iowa 202, 68 N. W. 780 (1896).

Trust Property

(*f*) Neither shall the banker have his lien upon non-negotiable property subject to a trust, and improperly left with him or pledged to him by the trustee, though the bank is without notice of the trust; unless, indeed, the *cestui que trust* shall have done some act or been guilty of some negligence such as to deprive him of his counter rights.[13] And a deposit in the name of A. as agent or trustee, or in the name of A. if the bank has notice that it belongs to another, cannot be applied by the bank to A.'s debt to itself, nor will it have any lien on a fiduciary deposit. If the trust property is traceable into the debt now due from the bank to the depositor, the true owner can claim the fund.[14]

(*g*) But if the trust property consists of bills or notes, payable to bearer, or other property transferable by delivery merely, and be not ear-marked as trust property, if the customer deposit them as if they were his own, and the banker receives them in due course, *bona fide* and with no notice of the trust, he shall hold them under his lien.[15]

In the case of money, or any negotiable securities, it has been frequently held that where the bank has no notice that they do not belong to the depositor, it acquires a valid lien for his indebtedness.[16] Though it has been held, that, if A. delivers promissory

[13] Manningford *v.* Toleman, 1 Coll. 670; Stackhouse *v.* Countess of Jersey, 30 L. J. Ch. 421; Murray *v.* Pinkett, 12 Cl. & F. 764; Locke *v.* Prescott, 32 Beav. 261; Fisher *v.* Knight, 61 Fed. 491.

[14] National Bank *v.* Insurance Co., 104 U. S. 54, 26 L. ed. 693; Knatchbul *v.* Hallett, L. R. 13 Ch. Div. 696; Cook *v.* Tullis, 18 Wall. 332, 21 L. ed. 933; Burtnett *v.* First National Bank, 38 Mich. 630; Neely *v.* Rood, 54 Mich. 134, 19 N. W. 920. See Title, § 565; Clemmer *v.* Drovers' National Bank, 157 Ill. 206, 41 N. E. 728; Union Stock Yards Bank *v.* Gillespie, 137 U. S. 411, 34 L. ed. 724, 11 Sup. 118 (1890); Preston *v.* Prather, 137 U. S. 604, 34 L. ed. 788, 11 Sup. Ct. 162 (1891); Boyle *v.* Northwestern National Bank, 125 Wis. 498, 103 N. W. 1123, 1 L. R. A. (N. S.) 1110, n. (1905); Emigh *v.* Earling, 134 Wis. 565, 115 N. W. 128, 27 L. R. A. (N. S.) 243, n. (1908); Indiana Trust Co. *v.* International Building Ass'n, 165 Ind. 597, 76 N. E. 304 (1905); Shuman *v.* Citizens' State Bank, 27 N. D. 599, 147 N. W. 388, 1915A L. R. A. 728.

If the bank has used the money it is liable in conversion to the owner. Globe Savings Bank *v.* National Bank, 64 Neb. 413, 89 N. W. 1030 (1902).

[15] Barnett *v.* Brandao, 6 M. & G. 630.

[16] As where the deposit was really trust money, or a note belonging to another, though unknown to the bank, the latter may apply it on the depositor's debt. School District *v.* First National Bank, 102 Mass. 174; Wood *v.* Boylston National Bank, 129 Mass. 358; Gordon *v.* Kearney, 17 Ohio 572; Meyers *v.* New York Co. National Bank, 36 App. Div.

notes to B. to get discounted for him, and B. takes them to his own banker for that purpose, who insists on placing them to the credit of B., B.'s account then showing a balance against him, equity would still compel the banker to account to A.[17]

And if the bank has notice that paper does not belong to the debtor, as where one bank sends paper to another indorsed "for collection on account of A. B.", the receiving bank cannot apply the proceeds to the debt of the transmitting bank, as it may in the absence of any notice that it does not belong to the debtor bank [18] (except in New York, etc., in some cases, see Title, § 565).

§ 327. **Several Accounts in the Same Right.** — Where a depositor keeps several accounts with his banker, as, for example, a general account, a loan account, and a discount account, all being in fact kept by him in his own right, nothing short of a clear and distinct contract to that effect will prevent the bank from fastening its lien upon any securities it may obtain for reimbursement of any of these accounts which may be overdrawn.[1]

If the customer has more than one account with his bank, it is his privilege, upon making any deposit, to declare to the credit of which account it shall be carried, and the banker cannot alter this appropriation. But if, at the time of depositing, the depositor neglects to appropriate, then the bankers may, *within any reasonable time thereafter,* appropriate the amount to either of the customer's accounts that they see fit.[2] The importance of this privilege to the bank is easily seen to be great when it happens that, at the time of making the deposit, the customer *has overdrawn any one of his several accounts,* for then the bank may apply upon this account the amount of any unappropriated deposit. But, except for this privilege, the bank must preserve the distinc-

(Hun, N. Y.) 102 (1899); London and River Plate Bank *v.* Hanover National Bank, 36 App. Div. (Hun, N. Y.) 487 (1899); Pederson *v.* So. Omaha National Bank, 52 Neb. 95, 71 N. W. 973 (1897); First National Bank *v.* City National Bank, 102 Mo. App. 357, 76 S. W. 489 (1903); Matter of McElheny, 91 App. Div. 131 (1904), 86 N. Y. S. 326. See Title, § 565.

[17] Grant on Banking. Lord Bolingbroke's Case, in Joy *v.* Campbell, 1 Sch. & L. 346.

[18] Bank of Metropolis *v.* First National Bank, 22 Blatchf. 58; First National Bank *v.* Reno Co. Bank, 3 Fed. 257; Claflin *v.* Wilson, 51 Iowa 15, 50 N. W. 578; White *v.* National Bank, 102 U. S. 658, 26 L. ed. 250; Blaine *v.* Bourne, 11 R. I. 119.

[1] § 327. *In re* European Bank, 8 L. R. App. 41; and see Pedder *v.* Preston, 9 Jur. N. S. 496; 11 C. B. N. S. 535; Gruenther *v.* Bank of Munroe, 90 Neb. 280, 133 N. W. 402 (1911).

tion between the accounts, and could not transfer from one to supply a deficiency in another,[3] nor appropriate a deposit expressed to be made to the one to any other;[4] unless indeed the accounts, though in form distinct, are yet both in fact kept by the depositor *in the same right*, in which case it seems that the bank may protect itself by such process of transferring credits and debits between the two as may be necessary.[5]

(*a*) An entry in the customer's books has been held not to be evidence of an appropriation by him.[6]

It has been held that a banker may appropriate a deposit, not appropriated by the depositor, to the credit of an account or indebtedness owing by this depositor to this banker and a former partner of his; although, at the same time, the depositor is also indebted upon a further account to the banker himself as successor to the old firm.[7]

(*b*) But if a stipulation of suretyship in terms expressly appears to provide for and cover a series of future advances, to be constantly paid off and renewed, it is obvious that the surety is not discharged when the amount named in the bond has been once met by deposits.[8]

(*c*) Where a running account contains legal and illegal items mingled together, payments will be considered as appropriated to discharge the legal items, in their own order, in preference to the illegal items.[9]

(*d*) An unappropriated deposit may be appropriated by the banker to the discharge of an indebtedness of the depositor barred by the Statute of Limitations.[10]

Bank may Combine the Accounts of its Branches

(*e*) A depositor's balance in one branch of a bank may be applied to his debt in another branch. A. had a balance at the L.

[2] Simson *v.* Ingham, 2 Barn. & Cr. 72; State Bank *v.* Armstrong, 4 Dev. (N. C.) 519.

[3] *Ex parte* Kingston, *In re* Gross, 6 L. R. Ch. App. 632.

[4] Farley *v.* Turner, 26 L. J. Ch. 710.

[5] Pedder *v.* Preston, 9 Jur. N. S. 496; 11 C. B. N. S. 535; and see *In re* European Bank, 8 L. R. App. 41.

[6] Manning *v.* Westerne, 2 Vern. 606.

[7] Snead *v.* Williams, 8 L. T. N. S. 115.

[8] Henniker *v.* Wigg, 4 Q. B. 792.

[9] *Ex parte* Randleson, 2 Deac. & C. 534; Wright *v.* Laing, 3 Barn. & Cr. 165.

[10] Williams *v.* Griffith, 5 M. & W. 300.

branch of a bank, and owed the B. branch. He drew a check on the L. branch, but the bank combined the accounts of the two branches, thus reducing A.'s assets below the amount of the check, and refused to pay it. There being no special contract, it was held that the bank could rightfully combine the accounts.[11]

§ 328. **What can be charged on General Account.** — A. had deposited money, notes, checks, etc., on general account, so that at his death the bank owed him $930. But the bank had a judgment against him more than enough to offset this, and A. had moreover kept a sum of money that had been given him to deposit in the bank. Upon the question whether the bank had a right to charge against A.'s general account the sum received for use of the bank, and which he refused to pay over, the court said: "There can be no question that, if the bank had paid off a note or acceptance of his, payable at the bank, this would have constituted a proper debit in the account. It is not to be doubted also but that they had a right to apply his funds in their hands to the payment of any note or acceptance of his held by them. From the nature of this account as an open running account of the cash transactions of the parties, embracing a variety of receipts and payments, debits and credits, from the manner of their dealing, etc., *either has a right to retain for, or to charge in account against the other, money received by the latter for the use of the former, so that the balance thus ascertained shall be the true debt.*" [1]

§ 329. **Unmatured Debt.** — The lien of the bank does not attach until some indebtedness is actually in existence and matured.[1] Thus, a bank holding a note of a depositor has no right of set-off, and no valid lien, before the note matures;[1a] so that it has been held that if, in the interval before the maturity,

[11] Garnett *v.* M'Kewan, Law R. 8 Ex. 10 (1872).

[1] § 328. State Bank *v.* Armstrong, 4 Dev. (N. C.) 519. See Dale *v.* Scollet, 4 Burr. 2133; Greene *v.* Farmer, 4 Burr. 2214; Sachs *v.* Sachs, 181 Ill. App. 342 (1913); Bloom *v.* Winthrop State Bank, 121 Iowa 101, 96 N. W. 733 (1903).

[1] § 329. Jordan *v.* National Shoe & Leather Bank, 74 N. Y. 467; Heidelbach *v.* National Park Bank, 87 Hun (N. Y.) 117; Pearsall *v.* Nassau National Bank, 74 App. Div. 89 (1902), 77 N. Y. S. 11; Steelman *v.* Atchley, 98 Ark. 294, 135 S. W. 902 (1911).

A demand note is due at once for the purpose of set-off. Citizens' Savings Bank *v.* Vaughan, 115 Mich. 156, 73 N. W. 143 (1897).

[1a] With the consent of the depositor the bank may charge off the amount of a note before it matures. Steiner *v.* Mutual Alliance Trust Co., 139 App. Div. 654 (1910), 124 N. Y. S. 184; Commercial National Bank *v.* Brinton, 45 Utah 265, 145 Pac. 42 (1915).

the depositor makes an assignment of his funds, without the knowledge of the bank, but otherwise legal, the amount of his balance will pass to the assignee.[2] So in Illinois and Missouri it is held that a bank has no lien on the funds of a depositor to apply them on a debt not yet due,[3] and cannot retain them against a checkholder.[4]

Equity will Guard against Danger of Loss if it Exists, by Allowing the Bank to Retain the Deposit against Immature Debt

This is a strict law. But it would seem that in equity the bank might have a safeguard. The case has arisen where a depositor's note had been discounted by the bank; before its maturity he died; at the time of his death the amount of his deposit exceeded the amount of the note; by a court of equity it was held, upon application by the bank, and proof of danger of the insolvency of his estate and also of the indorsers on the note, that equity would allow the bank to retain enough of the deposit to meet the note; though it was said, in law the debt *in futuro* could not be set off against the debt *in præsenti*.[5] The sound justice of this is obvious. For it is certain that bankers will often make loans and discounts to a good customer, whose balance, though constantly shifting, is generally good, with the fair expectation that, in the ordinary course of dealing, they will in time have funds enough come to their hands to secure them against loss. But where the

[2] Giles *v.* Perkins, 9 East 12, per Lord Ellenborough; Beckwith *v.* Union Bank, 4 Sandf. Super. (N. Y.) 604, is sometimes cited to the same point, but it is not a very satisfactory authority. Jones *v.* Manufacturers' Bank, 10 Week. No. Cas. (Pa.) 102; Ellis *v.* First National Bank, 22 R. I. 565, 48 Atl. 936 (1901).

[3] Merchants' National Bank *v.* Ritizinger, 20 Ill. App. 29 (1886); Com. National Bank *v.* Proctor, 98 Ill. 558; Johnson County Savings Bank *v.* Renfro, 57 Tex. Civ. App. 160, 122 S. W. 37 (1909); Elzy *v.* Morrison, 180 Ill. App. 711 (1913).

[4] Zelle *v.* German Savings Institution, 4 Mo. App. 401 (1887); Columbia National Bank *v.* German National Bank, 56 Neb. 804, 77 N. W. 346 (1898); First Dearborn National Bank *v.* Blumenzeverg, 46 Ill. App. 297; Wiley *v.* Bunker Hill National Bank, 183 Mass. 495, 67 N. E. 655 (1903).

But if a note matures between the death of a depositor and the commencement of action by the administrator of the deceased for the amount on deposit in the name of the deceased the note may be set off by authority of Pierce's Code, §§ 380, 1091 and 1093. Fishburne *v.* Merchants' Bank, 42 Wash. 473, 85 Pac. 38 (1906).

[5] Ford's Adm'r *v.* Thornton, 3 Leigh (Va.) 695. See also Thomas *v.* Exchange Bank, 99 Iowa 202, 68 N. W. 780 (1896).

bank discounted the customer's note for $5000, placing the amount to his general credit, and he gave his check for $1000, and then became bankrupt, it was held that, as against the owner of the check, the bank had no lien on the general deposit account to secure the note, which had not yet matured at the time when the check was presented for payment.[6] This case arose in Illinois, where the check-holder's right of action against the bank is recognized. In the absence of such a right of action, it is not impossible that the bank might have simply refused, with impunity, to honor the check, and so ultimately secured all the advantages of the lien which the law expressly declares not to exist.

It has been held also, in Missouri, Minnesota, Kentucky, Iowa, Georgia, Maryland and Texas, that if a depositor is insolvent his deposit may be retained for an unmatured debt.[7]

But in New York a bank has no lien upon the property or funds of an insolvent depositor for a note discounted by the bank until the note becomes due.[7a]

[6] Fourth National Bank of Chicago *v.* City National Bank of Grand Rapids, 68 Ill. 398.

[7] Knecht *v.* United States Savings Institute, 2 Mo. App. 563; Sweetser *v.* People's Bank, 69 Minn. 196, 71 N. W. 934 (1897); Stolze *v.* Bank, 67 Minn. 172, 69 N. W. 813 (1897); Kentucky Flour Company's Assignee *v.* Merchants' National Bank, 90 Ky. 229, 13 S. W. 910 (1890); Thomas *v.* Exchange Bank, 99 Iowa 202, 68 N. W. 780 (1896); Georgia Seed Co. *v.* Talmage, 96 Ga. 256 (1895), 22 S. E. 1001; Brown *v.* Sheldon State Bank, 139 Iowa 83, 117 N. W. 289 (1908), citing cases from Pennsylvania, Michigan, North Carolina, New Jersey and the United States; Neely *v.* Grayson Co. National Bank, 25 Tex. Civ. App. 513, 61 S. W. 559 (1901); Owens *v.* American National Bank, 36 Tex. Civ. App. 490, 81 S. W. 988 (1904); Hayden *v.* Citizens' National Bank, 120 Md. 163, 87 Atl. 672, 1915A Ann. Cas. 686, n., 46 L. R. A. (n. s.) 1059, n.; Little's Adm'r *v.* City National Bank, 115 Ky. 629, 74 S. W. 699, 103 Am. St. Rep. 349 (1903). See also dictum in Jordan *v.* National Shoe & Leather Bank, 74 N. Y. 473.

[7a] Smith *v.* Eighth Ward Bank, 31 App. Div. (Hun. N. Y.) 6 (1898); Irish *v.* Citizens' Trust Co., 163 Fed. 880 (1908). But see Frank *v.* Mercantile National Bank, 100 App. Div. 449 (1905), 91 N. Y. S. 488; Delahunty *v.* Central National Bank, 63 App. Div. 177 (1901), 71 N. Y. S. 416.

In South Carolina a depositor's consent is necessary before a bank can apply funds subject to check to a depositor's unmatured notes. Callahan *v.* Bank of Anderson, 69 S. C. 374, 48 S. E. 293 (1904); Bank of Spartanburg *v.* Mahon, 78 S. C. 408, 59 S. E. 31 (1907).

In Massachusetts a bank has no right of equitable set-off entitling it to refuse to pay its customers' check so as to apply the funds to the notes of the depositor not yet due on the ground of the depositor's insolvency if proceedings in insolvency or bankruptcy have not been instituted by or against him and he has made no common law assignment. Wiley *v.* Bunker Hill National Bank, 183 Mass. 495, 67 N. E. 655 (1903).

And in Michigan mere insolvency is insufficient to allow the bank an equitable set-off of unmatured guaranteed notes.[7b] In Jordan *v.* National Bank,[1] there was no insolvency or any element on which an equitable set-off could be based. The case rested on the statute, and the court decided that the bank had no lien or set-off for an unmatured debt, no fact being averred on which to found an equitable jurisdiction.

Equitable set-offs existed before statutory ones, and are independent of the latter;[8] and although future debt cannot at law be offset against present debt,[9] yet equity will always, upon proof of danger, as by the probable insolvency of the debtor, allow the bank to retain his deposit.[10]

So in Ohio an unmatured note discounted by the bank can be set off against the deposit, saving harmless *bona fide* check-holders.[11]

Authority given by the depositor to the bank to apply deposits to the payment of unmatured debts is only a naked power, not coupled with an interest, and is revoked by notice of the depositor's debt.[11a]

When a depositor promises to keep a fair balance at the bank, it does not imply that the balance is to be held by the bank for unmatured debts.[11b]

§ 330. **Loss of Lien.** — A lien may be lost, if, after it has been established, the banker takes security for the debt, payable at a distant day.[1]

So a lien may be lost by voluntarily giving up possession of the property,[1a] or by conversion, or express agreement. But loss of possession by force, fraud, or mistake will not destroy a lien, nor will a proper repledging of pledged property on the first pledgee's account, if the repledging does not go beyond the first pledgee's right in the property.

[7b] Merchants' National Bank *v.* Stone, 45 Mich. 648 (1898). See also note to Fera *v.* Wickham, 17 L. R. A. 456 (N. Y.).

[8] Story's Equity, ch. 38; *Ex parte* Stephens, 11 Ves. Jr. 24; *Ex parte* Flint, 1 Swans. 30; *Ex parte* Blagden, 19 Ves. Jr. 466.

[9] Martin *v.* Kunzmuller, 37 N. Y. 396, and cases cited.

[10] See note 7.

[11] Skunk *v.* Merchants' National Bank, 19 Chic. Leg. N. 83.

[11a] Gardner *v.* First National Bank, 10 Mont. 149 (1890).

[11b] Comer *v.* Bank of Commerce, 140 Mo. 225, 41 S. W. 790 (1897).

[1] § 330. Cowell *v.* Simpson, 16 Ves. Jr. 278; Hewison *v.* Guthrie, 3 Scott 311; 2 Bing. N. C. 755.

[1a] But when the cashier allows the transfer of funds of a notoriously insolvent depositor to the account of his assignee who knows that the cashier is transcending his authority the right of lien is not lost. Ellis *v.* First National Bank, 22 R. I. 565, 48 Atl. 936 (1901).

The right of lien on a note of a depositor is not affected by the fact that the bank has pledged such note as security to a third person.[2]

§ 331. **Bank estopped to assert a Lien.** — Where a bank made a mistake in settlement, but waited until two years after, when the former depositor opened a new account, and then sprung the claim upon him, it was held that such conduct was not up to the proper standard of good faith, that the bank should have notified the depositor at once of the error, and that its silence had misled the depositor into making a new deposit, and the bank could not retain it.[1]

It seems clear that the bank's conduct was not fair, but that alone is not enough to change legal rights; the further question must be answered, Did the neglect of the bank to notify the depositor occasion him any loss, or render the evidence of the matter obscure? If the mistake could be clearly proved, and the bank, knowing the man, preferred the method it selected to a lawsuit, and no injury was done to the depositor, we cannot see why the bank might not retain the deposit. But if the depositor drew checks against the new deposit, and only on their presentation was notified of the claim, the bank should be held estopped.

The Bank is Estopped to Assert a Lien against R. as to Advances Made after R. Purchased a Part of the Land Covered by the Lien with the Bank's Knowledge

(*a*) B., after depositing title deeds with a bank to secure all sums to become due on a general balance of his account with the bank, contracted, with the bank's knowledge, to sell part of the land to R., who knew of the terms of deposit of the deeds. B. afterwards paid into the bank more than the balance due it at the time of the contract of sale, thus (according to Clayton's Case, 1 Meriv. 585) discharging his debt. The bank, without notifying R., made fresh advances to B., keeping him always in debt to the bank. R. paid the purchase money by instalments to B. *Held*, that the bank had no charge on the land as against

[2] Clute *v.* Warner, 8 N. Y. App. Div. 40.

[1] § 331. Hancock *v.* Citizens' Bank, 32 La. Ann. 590.

If the bank fails to notify the depositor that it has exercised its right of set-off until a check is presented to it for payment in favor of a third person it is liable for damages for dishonoring the check. Callahan *v.* Bank of Anderson, 69 S. C. 374, 48 S. E. 293 (1904).

R. for the *fresh advances;* also, that the bank had no charge upon the purchase money.

The bank was estopped from claiming a lien against R. for a cause arising *subsequent to R.'s purchase with the knowledge of the bank.*[2]

B. bought cotton borrowed from the F. Bank and deposited the warehouse receipts with the bank as security for this and other debts. B. owed the bank a large amount and was insolvent. A. bought the cotton from B. with the bank's assent and without notice that the bank claimed a lien on it. The lien being unrecorded, and unknown to A., it had no effect against him.[3]

When a bank upon inquiry from the indorser of a certificate of deposit issued to one of its customers, assures him that the same would be paid upon its presentment, and he is thus lulled into a feeling of security which prevents him and the holder to whom he communicates the information from taking steps to protect themselves, the bank is estopped to assert the defence of lien for an overdraft.[4]

§ 332. **General Liens are not favored,** and must rest upon special agreement, course of dealing between the parties, or general usage.[1]

And if there is any circumstance inconsistent with the claim of a lien, it will not be upheld, as where securities are delivered to a bank for a specific purpose.[2]

§ 333. **A Banker's Lien in Pennsylvania, New York, etc.** — The pledge of securities for an antecedent debt, being founded on no present valuable consideration, is taken subject to the equities subsisting between the pledgor and third parties.[1]

The doctrine in Pennsylvania is, that a banker has a general lien on securities, unless deposited under express contract, or under circumstances showing an implied inconsistent contract; but a holder merely for an antecedent debt is not protected against equities existing in third parties, and the courts say that neither decisions out of Pennsylvania nor usage can affect the rule. It

[2] London & Co. Banking Co. *v.* Ratcliffe, L. R. 6 App. Cas. 722 (1881).

[3] Bank *v.* Slayden, 8 Tex. Civ. App. 63.

[4] Old National Bank *v.* Exchange National Bank, 50 Wash. 418, 97 Pac. 462 (1908).

[1] § 332. Grant *v.* Taylor, 35 N. Y. Super. Ct. 351; American National Bank *v.* Minor, 142 Ky. 792, 135 S. W. 278 (1911).

[2] Bank of Metropolis *v.* New England Bank, 1 How. 234, 11 L. ed. 115.

[1] § 333. Liggett Spring & Axle Co.'s Appeal, 111 Pa. St. 291.

is very probable, however, that they are mistaken in this, and that succeeding judges may find a way to bring Pennsylvania into harmony with her sister States.

In California a bank cannot set-off against a deposit an amount due it on a mortgage indebtedness.[2]

§ 334. **Set-off. — The Debts must be in the same Right.** — The rules of law as to the right of set-off between the bank and its depositors are not different from those applicable to other parties.[0]

The debts must be between the same parties and in the same right.[1] A deposit due to A. as executor cannot be offset against A.'s personal debt, nor *vice versa*.[2] It is not necessary that the

[2] McKean *v.* German-American Savings Bank, 118 Cal. 334, 50 Pac. 656 (1897).

[0] § 334. Eyrich *v.* Capital State Bank, 67 Miss. 70, 6 So. 615 (1889).

The bank has a right to set off from a general deposit a balance of the general account of its depositor. Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228 (1910); Bank of Lawrenceville *v.* Rockmore, 129 Ga. 582, 59 S. E. 291 (1907); Hiller *v.* Bank of Columbia, 92 S. C. 445, 75 S. E. 789 (1912); *id.*, 96 S. C. 74, 79 S. E. 899 (1913).

[1] Miller *v.* Mickel, 9 Colo. 331, 12 Pac. 240; Scott *v.* Fritz, 51 Pa. St. 418; Fry *v.* Evans, 8 Wend. (N. Y.) 530; Canonsburg Iron Co. *v.* Union National Bank, 34 Pitts. L. J. 93 (1886); Stuart *v.* Commonwealth, 8 Watts (Pa.) 74; Grew *v.* Burditt, 9 Pick. (Mass.) 265; Thomas *v.* Hopper, 5 Ala. 442; Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804 (1901).

A bank may show that a transaction in the name of the president of another bank is really the transaction of the bank of which he is president. Kendrick State Bank *v.* First National Bank, 213 Fed. 610 (1914); *id.*, 206 Fed. 940 (1913).

When a deposit in the name of R. & Co. is attempted to be set off against an indebtedness of R. the bank may introduce evidence to show that R. & Co. is really R. Bank of Lawrenceville *v.* Rockmore, 129 Ga. 582, 59 S. E. 291 (1907).

A bank has no right to apply money of its depositor to the payment of a note on which he is surety or guarantor. O'Grady *v.* Stotts City Bank, 106 Mo. App. 366, 80 S. W. 696 (1904).

A certificate of deposit acquired by a depositor by assignment from a third person subsequent to the bank's insolvency cannot be set off against a claim due the bank by said depositor. Oates *v.* Smith, 176 Ala. 39, 57 So. 438 (1912); but Nix *v.* Ellis, 118 Ga. 345, 45 S. E. 404, 98 Am. St. Rep. 111 (1903) holds that a claim purchased by one after assignment for benefit of creditors may be set off.

[2] See cases above, and Tobey *v.* Manuf. National Bank, 9 R. I. 236.

A deposit due to A., as County treasurer, or as trustee, cannot be set off against the individual indebtedness of A. Skipwith *v.* Hurt, 94 Tex. 322, 60 S. W. 423 (1901); Walters National Bank *v.* Bantock, 41 Okla. 153, 137 Pac. 717, 1915C L. R. A. 531; Wagner *v.* Citizens' Bank etc. Co., 122 Tenn. 164, 122 S. W. 245, 135 Am. St. Rep. 869, 28 L. R. A. (N. S.) 484, n. (1909). See Blood *v.* Kane, 130 N. Y. 514, 29 N. E. 994, 15 L. R. A. 490. But the fact that the depositor had Adm'r. added to

claim should run between the nominal parties to the suit, if they are *really due to and from the same funds on both sides;* as where a note was discounted for the benefit, not of the maker, but of the indorser, it was held in a suit by the bank against the maker, that a deposit to the credit of the indorser should be set-off against the note.[3]

And in another case where a note was discounted for an indorser, and the amount credited to him and partly drawn out by him, it was said that the bank could, if it so desired, apply the balance remaining to the indorser's credit toward payment of the note.[4] An individual deposit cannot be offset against a partnership debt.[5] Nor can the debt of one partner on a note indorsed by the other partner be set off by the bank against the deposit of the firm.[5a]

It would seem that set-off could only be availed of by the bank in respect of the personal deposits of the depositor. But where money was deposited in the name of the depositor's wife, the depositor being at the time insolvent and indebted to the bank, set-off was allowed upon proof that the money thus deposited had been raised upon the mortgage of the husband's property, in which the wife had joined in the usual form.[6]

his name will not prevent the set-off where the bank did not know the money belonged to the estate of which he was administrator. Sparrow *v.* State Exchange Bank, 103 Mo. App. 338, 77 S. W. 168 (1903); and when money deposited in a bank is without the knowledge of the bank mingled by the depositor with trust money, the bank may set off against such deposit an antecedent debt of the depositor if the application to the debt is consented to by the depositor, which consent will be implied if the deposit is made in the face of an overdraft or past due obligation. Shuman *v.* Citizens' State Bank, 27 N. D. 599, 147 N. W. 388, 1915A L. R. A. 728.

Mutuality is not always controlling in an action by or against personal representatives of an estate which involves its assets, but it will be departed from where it appears that permitting the offset to be interposed cannot in any respect embarrass the administration of the estate or prejudice the rights or interests of any other party interested in its assets. People *v.* California Safe etc. Co., 168 Cal. 241, 141 Pac. 1181, 1915A L. R. A. 299, n.

[3] Shackamaxon Bank *v.* Kinsler, 16 Week. No. Cas. (Pa.) 509.

[4] Ticonic Bank *v.* Johnson, 21 Me. 426.

[5] International Bank of Chicago *v.* Jones, 119 Ill. 407 (1887), 9 N. E. 885; Adams *v.* Bank, 113 N. C. 335, 18 S. E. 513 (1893); Kroll *v.* Union Trust Co., 133 Mich. 638, 95 N. W. 735 (1903).

[5a] Hodgin *v.* People's National Bank, 124 N. C. 540, 32 S. E. 887 (1899). See Bank of Lawrenceville *v.* Rockmore, 129 Ga. 582, 59 S. E. 291 (1907).

[6] Citizens' Bank of Garnett *v.* Bowen, 21 Kan. 354.

Where a wife deposits in a bank, in her own name, money of her general estate, and the bank becomes insolvent, the husband, being indebted to the bank, has a right to set off the wife's deposit against his indebtedness.[7]

§ 335. **Certainty.** — The claims set off must be certain, *i.e.* either already reduced to precise figures, or capable of being liquidated by calculation without the intervention of a jury to estimate the sum.[1] And when the claim sought to be used as an offset requires the decision of a jury on the question of negligence before the claim is established, it cannot be offset, even though the amount of the judgment is very clear, provided there should be any judgment in favor of the claim. As where a bond deposited as collateral for a note was lost, and in suit by the bank on the note the maker tried to offset the loss of the bond.[2]

A judgment, or contract claim, that can be sued in debt, assumpsit, or covenant, may be set off.[3] But a demand that must be sued upon in tort, or by bill in equity, cannot be set off.[4]

§ 336. **Goods as such not a Subject of Set-off. — Certified Check in Set-off.** — A bank may set off a discounted note held by it against pecuniary credits to the maker upon the latter's insolvency. Goods merely in the possession of the bank, and not intrusted to it to be turned into a money credit, are not the subject of set-off.[1]

Herein set-off differs from a lien. Set-off cannot confer a right to detain property the title to which is in another, but only to set one money claim against another.[1a]

[7] Hall *v.* New Farmers' Bank, 98 Ky. 146, 32 S. W. 400 (1895).

A bank cannot set off a wife's money against a debt of her husband. Robards *v.* Hamrick, 39 Ind. App. 134, 79 N. E. 386 (1906).

[1] § 335. Wilmot *v.* Hurd, 11 Wend. (N. Y.) 584; Thomson *v.* Redman, 11 M. & W. 487; Tallapoosa County Bank *v.* Wynn, 173 Ala. 272, 55 So. 1011 (1911); Marine Bank *v.* Stirling, 115 Md. 90, 80 Atl. 736 (1911).

[2] Winthrop Savings Bank *v.* Jackson, 67 Me. 570.

[3] Hutchinson *v.* Sturges, Willes 261.

[4] Dean *v.* Allen, 8 Johns. (N. Y.) 390; Gilchrist *v.* Leonard, 2 Bailey (S. C.) 135; Ben Roy Irvine *v.* Dean, 93 Tenn. 350, 27 S. W. 666 (1894); Tallapoosa County Bank *v.* Wynn, 173 Ala. 272, 55 So. 1011 (1911); Elliott *v.* Peet, 192 Fed. 699 (1912).

[1] § 336. Stetson *v.* Exchange Bank, 7 Gray (Mass.) 425, citing Demmon *v.* Boylston Bank, 5 Cush. (Mass.) 194; Rose *v.* Hart, 8 Taunt. 499.

[1a] In strictness a set-off is a counter claim which the defendant may interpose by way of cross action against the plaintiff. Studley *v.* Boylston National Bank, 229 U. S. 523, 57 L. ed. 1313, 33 Sup. Ct. 806 (1913).

(*a*) A banker, upon whom a check has been drawn, and who has certified it, cannot set off against the same any debt or demand which he may have against the holder when the check is finally presented for payment. For, it is said, the check is not a payment made by the drawer to the holder, creating, therefore, a new debt from the banker to the holder, but is merely a means of procuring payment; and if that means should fail from any cause, be it such a set-off or other circumstance, the drawer remains liable.[2] This reasoning seems by no means beyond criticism. The unquestionable weight of the authorities is to the purport that the certification does create a direct debt from the bank to whomsoever is or may come to be the holder of the check, and that such holder occupies the position of a simple contract creditor or depositor; also that the drawer does not remain liable on his original debt. If such be the case, it is hard to see why the set-off might not be allowed.

§ 337. **When Depositor is insolvent.** — The various items of deposit with and payment by the bank form a running account between the bank and the customer. For any indebtedness accruing from the customer to itself, the bank has the right to set-off. If the depositor becomes bankrupt, his deposit becomes security for the payment of his debt to the bank. If this debt be contingent in character, or if it be a claim for unliquidated damages arising out of a contract, then the bank may retain possession of the deposit until such time as the probable indebtedness shall be ascertained, when the deposit may be set off against it.[1] The rule was laid down by Judge Lowell in the case

[2] Brown *v.* Leckie, 43 Ill. 497.

[1] § 337. *In re* North, 16 National Bankr. Reg. (Mass. Dist.) 420; *Ex parte* Howard National Bank, 2 Low. 487. See Kelly & Co. *v.* Phelan, 5 Dill. 228; *Ex parte* Hornby, De Gex 69; Farmers' Deposit National Bank *v.* Penn Bank, 123 Pa. St. 283, 16 Atl. 761; Georgia Seed Co. *v.* Salmadge, 95 Ga. 259, 22 S. E. 1001 (1895), citing Belcher *v.* Wilcox, 40 Ga. 391; Ricks *v.* Broyles, 78 Ga. 610, 3 S. E. 772; Penn Bank *v.* Farmers' Deposit National Bank, 130 Pa. St. 209, 20 Atl. 150; Cox *v.* First National Bank, 126 La. 88, 52 So. 227 (1910); Wiley *v.* Bunker Hill National Bank, 183 Mass. 495, 67 N. E. 655 (1903); Furber *v.* Dane, 203 Mass. 108, 89 N. E. 227 (1909); Templeman *v.* Hutchings, 24 Tex. Civ. App. 1, 57 S. W. 868 (1900); Steinhardt *v.* National Park Bank, 120 App. Div. 255 (1907), 105 N. Y. S. 23; Booth *v.* Prete, 81 Conn. 636, 71 Atl. 938, 20 L. R. A. (N. S.) 863, n. (1907); Lyman *v.* Belfast National Bank, 98 Me. 448, 57 Atl. 799 (1904); *In re* Hill Co., 130 Fed. 315 (1904); Wheaton *v.* Daily Telegraph Co., 124 Fed. 61 (1903); Irish *v.* Citizens' Trust Co., 163 Fed. 880 (1908); Walsh *v.* First National Bank, 201 Fed. 522 (1913); Germania etc. Tr. Co. *v.* Loeb, 188 Fed. 285 (1911); Whitaker

cited, that "the credit should be set off against the whole ultimate debt of the bank, that is to say against the aggregate amount of the notes of the bankrupt in which he is the principal debtor; and as to those on which he is indorser so far and so far only, as is made necessary by the insolvency of the real principals."

Judge Lowell further said, that he understood "the practice in England to be, that a banker who has discounted notes for his customer may prove for the whole money as so much lent to the customer, exhibiting a list of his notes or bills, which are called securities. Any deposit the banker has in hand would come out of this sum total. If, however, any bill or note is paid by other parties after the proof has been admitted, its amount is to be deducted from the total debt proved. In other words, the proof is considered as made on each note or bill separately, though not so in form." [2]

When a bank has refused to discount notes sent to it for that purpose its duty is to return the notes, and if it retains them it

v. Crowder State Bank, 26 Okla. 786, 110 Pac. 776 (1910); Frank *v.* Mercantile National Bank, 100 App. Div. 449 (1905), 91 N. Y. S. 488; New York County National Bank *v.* Massey, 192 U. S. 138, 48 L. ed. 380, 24 Sup. Ct. 199 (1904); Studley *v.* Boylston National Bank, 229 U. S. 523, 57 L. ed. 1313, 33 Sup. Ct. 806 (1912); Habegger *v.* First National Bank, 94 Minn. 445, 103 N. W. 216, 110 Am. St. Rep. 379 (1905).

An agreement whereby a bank is authorized to declare a note due and payable upon the insolvency of the depositor and to apply his deposit in payment thereof is simply an option or privilege which cannot be exercised after the appointment of a receiver. Eastern Mill etc. Co. *v.* Eastern Mill etc. Co., 146 Fed. 761 (1906); Corn Exch. National Bank *v.* Locher, 151 Fed. 764 (1907).

If the bank has mortgage security for a debt it must exhaust that security before it can apply the money on deposit to the reduction or cancellation of the debt. Guarini *v.* Swiss American Bank, 162 Cal. 181, 121 Pac. 726 (1912).

When the money does not reach the bank until after the death of the depositor there can be no set-off. Padgett *v.* Bank of Mountain View, 141 Mo. App. 374, 125 S. W. 219 (1910). Nor can there be a set-off for moneys collected on paper sent by another bank which becomes insolvent before remittance. *In re* Northrup, 159 Fed. 686 (1908).

The bank is not bound to exercise its right of set-off and if prior to the time when the right is claimed by the bank some creditor has intervened and by legal process obtained a claim upon the depositor's account, superior to the bank's right of set-off, such right is lost and cannot be exercised by the bank. Luthersville Banking Co. *v.* Hopkins, 12 Ga. App. 488, 77 S. E. 589 (1912).

[2] *Ex parte* Burn, 2 Rose 55; *Ex parte* Barratt, 1 Gl. & J. 327; *Ex parte* Hornby, De Gex 69.

cannot, as against general creditors, set off against the notes or their proceeds the insolvent's overdraft although made after refusal to discount the notes and pending their retention.[3]

§ 338. **Insolvency of the Bank. — Commercial Bank.** — Where the bank itself stops payment and becomes insolvent, the customer may avail himself in set-off against his indebtedness to the bank of any indebtedness of the bank to himself, as, for example, the balance due him on his deposit account.[1] So also, even though the debt to him has not matured at the time of the insolvency.[2] The right is an equitable, not a legal, one.[2a]

The right to set off an unmatured debt is not contrary to the National Banking Law, § 5242.[2b]

The maker [3] or indorser [4] of a note falling due after insolvency may set off his deposit, or a debt due him at the time of the assignment, but not a claim coming to him or due [4a] after the assignment.[5]

The set-off may be made equally well though the money deposited is not the money of the depositor, but the property of others held by him in trust or as custodian, and deposited by him

[3] Hanover National Bank *v.* Suddath, 215 U. S. 110, 54 L. ed. 115, 30 Sup. Ct. 63 (1909).

[1] § 338. McLaren *v.* Pennington, 1 Paige (N. Y.) 102; Receiver *v.* Paterson Gas Light Co., 23 N. J. L. 233; Platt, Receiver, *v.* Bentley, 11 Am. Law Reg. 171; Bernstein *v.* Coburn, 49 Neb. 734, 68 N. W. 1021 (1896); Mercer *v.* Dyer, 15 Mont. 317, 39 Pac. 314 (1894); The State *v.* Brobston, 94 Ga. 99, 21 S. E. 146 (1893), citing Ray *v.* Dennis, 5 Ga. 357; Morse *v.* Chapman, 24 Ga. 249; Scott *v.* Armstrong, 146 U. S. 499, 36 L. ed. 1059, 13 Sup. Ct. 148 (1892); Salladin *v.* Mitchell, 42 Neb. 860, 61 N. W. 127; Garrison *v.* Union Trust Co., 139 Mich. 392, 102 N. W. 978, 111 Am. St. Rep. 407, n. (1905).

[2] Bruyn *v.* Receiver, 9 Cow. (N. Y.) 413, n.; People *v.* St. Nicholas Bank, 76 Hun (N. Y.) 522.

If the debt of the bank is on a lease for rent which is not due at the time of the insolvency there can be no set-off. McGraw *v.* Union Trust Co., 135 Mich. 609, 98 N. W. 390 (1904).

[2a] Scott *v.* Armstrong, 146 U. S. 499, 36 L. ed. 1059, 13 Sup. Ct. 148 (1892).

[2b] Mercer *v.* Dyer, 15 Mont. 317, 39 Pac. 314 (1894).

[3] Jordan *v.* Sharlock, 84 Pa. St. 366; Adams *v.* Spokane Drug Store, 57 Fed. 888.

[4] Arnold *v.* Niess, 36 Leg. Int. (Pa.) 437; Davis *v.* Industrial Manufacturing Co., 114 N. C. 334 (1894); O'Connor *v.* Brandt, 12 N. Y. App. 596; Williams *v.* Ross, 218 Fed. 898 (1914); Curtis *v.* Davidson, 164 App. Div. 597 (1914), 150 N. Y. S. 305.

[4a] Storts *v.* George, 150 Mo. 1, 51 S. W. 489 (1899).

[5] Venango National Bank *v.* Taylor, 56 Pa. St. 15; Storts *v.* George, 150 Mo. 1, 51 S. W. 489 (1899); Davis *v.* Knipp, 92 Hun (N. Y.) 297.

as trustee.[6] But the accounts of individuals, as such, and of a firm of which they are members, cannot be thus availed of.[7] See § 560.

Where a judgment debtor of a bank deposits money with its branch, subject to his own check, and the money is lost by the failure of the bank, the deposit does not discharge the judgment.[7a]

An assignee of a deposit in an insolvent bank takes subject to the right of set-off for both assignor's and his own debts.[7b]

The assignee of a deposit in an insolvent bank cannot set off the amount on a note of his own held by the bank, pending the receivership.[7c]

In an action by a receiver of an insolvent bank on a note, defendant offering as set-off a certificate of deposit must show that he received it before the filing of the bill by which the assets of the bank were impounded for benefit of all its creditors.[8]

A receiver takes choses in action of a bank in the same plight in which they existed at the time of the filing of the proceedings under which he was appointed, and subject to all set-offs which might have been pleaded thereto in a suit by the bank itself.[8a]

A deposit cannot be set off against a liability as surety on a note if the principal is solvent.[8a]

A stockholder is not entitled to set off against an assessment on his stock the amount of his individual claim against the bank.[8b]

Where a bank borrows money from another bank, and authorizes its cashier in his own name to pledge promissory notes taken in the name of the cashier, but belonging to the borrowing bank, as security for the loan, and the loaning bank fails, having on

[6] Miller *v.* Receiver of Franklin Bank, 1 Paige (N. Y.) 444. See People *v.* California Safe etc. Co., 168 Cal. 41, 141 Pac. 1181 (1914).

[7] Watts *v.* Christie, 11 Beav. 546.

[7a] Spilman *v.* Payne, 84 Va. 439, 4 S. E. 749 (1888).

[7b] Davis *v.* Industrial Manufacturing Co., 114 N. C. 329, 19 S. E. 371 (1894).

[7c] Borough Bank *v.* Rosenweig, 147 App. Div. 175 (1911), 132 N. Y. S. 84.

[8] Smith *v.* Mosby, 9 Heisk. (Tenn.) 501 (1872).

[8a] Nix *v.* Ellis, 118 Ga. 345, 45 S. E. 404, 98 Am. St. Rep. 111 (1903); Steelman *v.* Atchley, 98 Ark. 294, 135 S. W. 902 (1911).

[8a] New Farmers' Bank's Trustee *v.* Young, 100 Ky. 683, 39 S. W. 46 (1897); Edmondson *v.* Thomasson, 112 Va. 326, 71 S. E. 536, 1913A Ann. Cas. 1300, n.; Knaffle *v.* Knoxville Banking Co., 128 Tenn. 181, 159 S. W. 838 (1913).

[8b] Williams *v.* Rose, 218 Fed. 898 (1914).

deposit money belonging to the borrowing bank in excess of the amount borrowed on the pledged promissory notes, the borrowing bank may institute suit in its own name against the receiver of the failing bank for the recovery of the promissory notes pledged, and in such suit, upon proper allegation and proof, is entitled to the return of the notes, and to have the sum borrowed on them set off against the amount on deposit.[8c]

§ 339. **Insolvency of Savings Bank.** — So long as the bank is solvent a depositor may offset his deposit against his debt to the bank, but so soon as the bank becomes insolvent this cannot be allowed. The depositors reap the profits, and must bear the losses resulting from the business of the bank.[1]

§ 339 A. **Insolvency of Savings and Loan Association.** — A stockholder in a savings and loan association organized under the laws of Ohio, is entitled, when the association becomes insolvent, to set off, as against its assignee for the benefit of creditors, a claim for money which he has on deposit with the association, against his liability for the unpaid part of his stock subscription.[1]

§ 340. **Set-off as against Debtor's Representatives.** — If the debt be mature at the time of the debtor's death, the bank has the right of set-off as against the heirs, executors, and administrators of the deceased, whether the estate be solvent or insolvent, precisely as it would have enjoyed the same right against the customer himself in his lifetime.[1]

[8c] Rankin *v.* Blain County Bank, 20 Okla. 68, 93 Pac. 536, 18 L. R. A. (N. S.) 512, n. (1907).

[1] § 339. Hannon *v.* Williams, 34 N. J. Eq. 255; Lawrence *v.* Nelson, 21 N. Y. 158. *Contra*, Matter of Receiver of New Amst. Savings Bank *v.* Tartter, 54 How. Pr. (N. Y.) 385; s. c. 4 Abb. N. C. (N. Y.) 215.

In Florida depositors in savings banks have the same rights as depositors in other banks and a set-off will be allowed. But deposits of others, purchased after the bank's insolvency, are not subject to the right of set-off. Robinson *v.* Aird, 43 Fla. 30, 29 So. 633 (1901).

[1] § 339 A. Niles *v.* Olszak, 87 Ohio St. 229, 100 N. E. 820 (1912).

[1] § 340. State Bank *v.* Armstrong, 4 Dev. (N. C.) 519.

CHAPTER XXIII

ADVERSE CLAIM

§ 342. Justifiable payment.

A payment otherwise good is not invalidated by the exist-
§ 344. ence of a claim of which the bank has no notice at the time of payment.

But after notice of an adverse title, a bank pays at its peril;
§ 342. yet, if sued or threatened with suit by the depositor or his
§ 343. attaching creditor, the bank cannot itself set up the adverse
(*b*) title, but may resort to a bill of interpleader. If it does not secure itself in this way, or by obtaining a bond of indemnity, it may have to pay a second time.

The true owner can recover in a suit against the bank, even
§ 343. though he did not give notice of his claim till after service of attachment on the deposit by a creditor of the depositor, but the court will require him to give the bank a bond of indemnity.

The substance of the matter is, that, as the bank is not at all interested in such disputes, it should not be annoyed and put to expense and danger by them. The bank, not being in any fault, should not be compelled to bear the consequences of the faults of others. Whenever an adverse claim exists, the bank should not be required to pay until the disputants have settled the matter between themselves, or one of them will give the bank a bond; and if either claimant sues the bank, it should have the privilege of sending the service, or referring the officer making service, to the opposing party, whereupon he should be considered the real party to the suit and be bound thereby, so that payment in accordance with the judgment rendered would forever release the bank. Mere notice to the bank of adverse claim should only affect it long enough for the claimant to proceed against the depositor directly; and if he does not promptly do this, the bank should be free to act as if it had never received notice of his claim.

A statute is in order to amend the injustice of the common law in this matter, which puts the bank to the expense of defending itself in suits in which it has no interest, or to the expense of a bill of interpleader (in those cases where it will be allowed, for it is not a remedy that can be used in all cases of adverse claim, it only applies where the claims are founded in privity or common contract, and strangers cannot be compelled to

interplead, especially where tort has intervened). 2 Story's Eq. Juris. §§ 812, 817–820; Story on Agency, § 217; Viner's Abr. Interpleader.

§ 342. **Payments in Case of Adverse Claims.** — A bank is justified in paying to the depositor or his order, or to the order of one designated by the depositor, until the fund is claimed by some other person.[1] But if notified that the deposit belongs to another, it will pay the depositor at its peril.[2]

After notice that a third person claims under a superior title, and intends to enforce the claim adversely to the depositor, the bank should hold the funds until the title is settled, or take a bond of indemnity, otherwise it may be the loser;[2a] as where a deposit in the name of A. was garnisheed as her husband's, the court decided that it belonged to him, and the bank paid it into court; but in a subsequent suit it was shown to belong to A., and the bank had to repay the amount.[3]

(*a*) A bank cannot defeat the suit of its depositor by showing adverse title in another. That other, or his attaching creditor, may dispute the depositor's title, but not the bank;[4] and as we have just seen, even a payment under judgment will not save

[1] § 342. McEwen *v.* Davis, 39 Ind. 109; Martin *v.* Kansas National Bank, 66 Kan. 655, 72 Pac. 218 (1903).

[2] First National Bank *v.* Bache, 71 Pa. St. 213. So where a bank paid money standing to "Trustees of Post 13, G.A.R." to one of the trustees after notice from the Post not to do so, it was liable. Arnold *et al.*, Post No. 13 *v.* Macungie Savings Bank, 71 Pa. St. 287; Jaselli *v.* Riggs National Bank, 36 App. Cas. (D. C.) 159, 1912C Ann. Cas. 119, n., 31 L. R. A. (N. S.) 763, n.; Drumm-Flato Com. Co. *v.* Gerlach Bank, 92 Mo. App. 326 (1901); Parks *v.* Knickerbocker Trust Co., 137 App. Div. 719 (1910), 122 N. Y. S. 521.

The bank may be restrained from paying a depositor even after he has sued the bank and recovered judgment. Spaulding Mfg. Co. *v.* Chaudoin, 87 Ark. 418, 112 S. W. 1087 (1908).

When a wife takes money of her husband and, without his knowledge deposits it in her name he has a right of action against the bank for its recovery. Phillips *v.* Suffolk Savings Bank, 219 Mass. 597, 107 N. E. 401 (1914).

[2a] If the claimant does not assert his right within a reasonable time he will be estopped. Drumm-Flato Com. Co. *v.* Gerlach Bank, 107 Mo. App. 426, 81 S. W. 503 (1904); *id.*, 92 Mo. App. 326 (1901).

[3] Crumb *v.* Treiber, Cuyahoga Dist. Ct. Ohio, 4 Ohio Dec. R. 492; Townsend *v.* Webster Five Cents Savings Bank, 143 Mass. 147, 9 N. E. 521; Bessemer Savings Bank *v.* Anderson, 134 Ala. 343, 32 So. 716, 92 Am. St. Rep. 38 (1901).

[4] First National Bank of Lock Haven *v.* Mason, 95 Pa. St. 113. See German Bank *v.* Himstedt, 42 Ark. 62; Parks *v.* Knickerbocker Trust Co., 137 App. Div. 719 (1910), 122 N. Y. S. 521; France Milling Co. *v.*

the bank from liability to the depositor. A bank may be able to save itself from future loss by persuading the party to whom it makes payment to give it a bond of indemnity.

Bill of Interpleader

(*b*) And, if possible, the claims should be adjusted without resorting to a bill of interpleader; but if a settlement cannot be reached that will insure safety to the bank, and it has reason to believe that the claim adverse to the depositor is well founded, it should bring the bill.[5]

But interpleader will not be decreed in some cases where it is most essential to the interest of the bank that it should be. A New Jersey case strongly illustrates this. The Vice-Chancellor said:[6] —

"This is a bill of interpleader. Its object is to compel the defendants, Philip W. Crater and Maria L. Bininger, to interplead in respect to the hostile title they set up to three government bonds, of the par value of $2,500, deposited with the complainants by Abraham M. Bininger, to indemnify two gentlemen who became his sureties on a recognizance, given by him on suing out a writ of error to remove a judgment against him.

"Mr. Crater and Mrs. Bininger set up independent adverse

First National Bank, 138 App. Div. 645 (1910), 122 N. Y. S. 736; Winkleblock *v.* Butler County Bank, 151 Mo. App. 9, 131 S. W. 905 (1910).

The bank may show that it paid out the deposit by transfer on its books to another pursuant to the agreement and direction of the depositor. Whitsett *v.* People's National Bank, 138 Mo. App. 81, 119 S. W. 999 (1909).

[5] Bell *v.* Hunt, 3 Barb. Ch. (N. Y.) 391; Bedell *v.* Hoffman, 2 Paige (N. Y.) 199; German Exchange Bank *v.* Commissioners, 6 Abb. N. C. (N. Y.) 394; Marvin *v.* Ellwood, 11 Paige (N. Y.) 365; Jaselli *v.* Riggs National Bank, 36 App. Cas. (D. C.) 159, 1912C Ann. Cas. 119, n., 31 L. R. A. (N. S.) 763, n.

Where a husband of testatrix and her executrix both claimed a deposit in a savings bank, a bill of interpleader was properly allowed. Phillips *v.* Suffolk Savings Bank, 219 Mass. 597, 107 N. E. 401 (1914).

Under section 15 of the banking laws of New York (Laws 1892, chap. 689) when an administrator of a depositor claims funds in a savings bank before an action is brought by the assignee of an alleged donee to recover the deposit, the administrator may be made party defendant. McGuire *v.* Auburn Savings Bank, 78 App. Div. 22 (1902), 79 N. Y. S. 91. But the statute has no application when a claim is set up by those who have only a future interest. Gifford *v.* Oneida Savings Bank, 99 App. Div. 25 (1904), 90 N. Y. S. 693.

[6] First National Bank of Morristown *v.* Bininger, 26 N. J. Eq. 345 (1875).

titles. Mr. Crater's title is founded in the ownership of Bininger. He claims by virtue of a judgment against Bininger and seizure and sale of the bonds under it. Mrs. Bininger, who is the wife of Abraham, claims that the bonds were purchased for her, with her own money; that her husband never had any interest in them; that their deposit with the complainants was wrongful or tortious as to her, and that the complainants, in withholding them against her demand, are wrongdoers.

"It will thus be seen that the position of the complainants towards the opposing claimants is radically different. To one they are under the obligations of a bailee. He may recover the bonds without showing title. When the object of the bailment was accomplished, they were bound to surrender them without inquiry as to title. As to the other, if her claim is true, they were wrongdoers, and disputed her right to the possession of the bonds, at their peril.

"Under this state of facts, have the complainants a right to require the opposing claimants to interplead?

"This question may be fully answered by simply quoting from elementary authorities.

"Judge Story, in his work on Bailments, § 110, says: 'Where the parties claim in absolute adverse rights, not founded in any privity of title, or any common contract, there the bailee must defend himself as he may, for, generally speaking, he cannot compel strangers to interplead with each other. Indeed, our law goes to the extent of ordinarily denying a bailee any right to set up the interest or title of a third person against the title of his own bailor.'

"In his work on Equity Pleadings, § 293, he states the rule as follows: 'Where the claimants assert their rights under adverse titles, and not in privity, and where the claims are of different natures, the bill is wholly unmaintainable.'

"And in his work on Equity Jurisprudence, §§ 819, 820, he gives the following illustration, and then states what he understands to be settled principle: 'Where a person is in possession of property as bailee, to which the bailor himself has no property title, but he is a mere tortious possessor, and the rightful owner demands it of the bailee, in such a case the question may arise whether he can compel the bailor and the rightful owner to interplead with each other. Upon principle, it would seem that he cannot, for not only is there no privity between him and the right-

ful owner, but he is himself liable to be deemed a wrongful possessor, if he should, after notice, withhold the property from the rightful owner.'

" ' The true doctrine would seem to be, that, in cases of adverse independent titles, the party holding the property must defend himself as well as he can at law, and he is not entitled to the assistance of a court of equity, for that would be to assume the right to try merely legal titles upon a controversy between different parties, where there is no privity of contract between them and the third person who calls for an interpleader.'

" Lord Brougham, in Pearson *v.* Cardon, 2 Russ. & Mylne, 606, in commenting on the question as to whether an agent or bailee had a right to compel his principal to litigate, with a stranger, the title to property held by him for his principal, denied its existence in the following emphatic language: ' Upon such a state of facts, can I hold this to be a common case of a claim by an agent against his principal, and of another party claiming by another title, foreign to the title of the principal? That an agent should have the power of filing a bill of interpleader, when his principal demands the re-delivery of his goods bailed with him, appeared to me so monstrous a proposition, and to involve such frightful consequences in mercantile transactions, that I could not suppose it was meant to contend for any such doctrine. For, in fact, it amounts to this: that an agent may, at any moment, treat his principal to a chancery suit; and I was therefore relieved to find that the plaintiff's counsel went entirely on the peculiarity of this case.'

" The contract of bailment, as given by the president of the complainants, was that the complainants were to hold the bonds as indemnity to the two gentlemen who had become bail for Mr. Bininger. Though there was no express stipulation to that effect, the law made it the duty of the complainants to surrender the bonds to Mr. Bininger when the liability of his bail ended. The relation of the complainants to Mr. Bininger and his bail grew out of a contract, which provided for the surrender of the bond in spite of any claim which might be made by a third person.

" The complainants seek to put their case on the ground that they are stakeholders or trustees. It seems to me impossible to say they hold either of these relations to Mrs. Bininger. At the time of the bailment she was unknown, she had no connection with it, and, if her claim is true, the complainant's possession of the bonds, if not tortious at its inception, became so after demand

and refusal. A stakeholder is a third person, chosen by two or more persons, to keep in deposit property the right or possession of which is in dispute, until some one of them establishes his right to it. A trustee is a person who holds the legal title to certain property, the beneficial use of which belongs to another. I think it would be an unwarrantable misuse of well defined terms to hold the complainants were either stakeholders or trustees of Mrs. Bininger.

"If this was a case of first impression, no difficulty would be found in declaring it fell clearly within the purposes designed to be accomplished in the establishment of a court of equity. But the rule, denying the right of the complainants to require Mrs. Bininger to interplead with the other defendants, is too firmly established to be changed by anything short of legislative power. (2 Story's Eq. Jur. § 320.)

"I cannot break through a rule so firmly established as to be, in the judgment of Judge Story, no longer open to discussion, even if it were clear that a better could be invented. Stability in legal rules is more important than that they should accomplish complete justice in every case."

Here we have a case in which the bank could not successfully defend itself at law against its bailor, because it could not set up the title of a stranger; yet if the title of the stranger was really good, the bank was guilty of tort in refusing to deliver to Mrs. Bininger; and still equity calmly says it cannot interfere to decree interpleader because the rule is well settled that the parties must be in privity in order to the granting of such decree. A stronger call for legislative correction could hardly be imagined, and it might be urged with force, that although stability in the law is valuable and not lightly to be interfered with, and when the law is only a formal one, this rule is paramount, yet that where real injustice exists under the name of law, to give stability to that law is to fortify injustice. The question is, Would greater harm result from change than from continuance? Change in this particular case would not result in any commercial disturbance, and it is hard to see why a court of equity, acknowledging, as the New Jersey court did, the justice of the case, should be unwilling to add one more stone to the temple of equity. Its walls would never have towered above the common law, if the mind of every judge had been fettered by the opinions of his predecessors.

The argument at B. is baseless, for equity would not have

to try legal titles, but only to send the parties *to law* to try them.

The argument at C. is baseless, for it is not the agent that treats the principal to a suit, but the third party who claims adversely, and if the agent does not act *bona fide* in the matter, of course he is answerable, and if the stranger does not walk up and take his part when interpleader is decreed, the matter is settled in favor of the principal.

It may be that the most just arrangement would be that notice from the adverse claimant to the bank should not hold the property any longer than would be necessary for said claimant to push his rights directly against the depositor; that if he did so, he should have an order (attachment, garnishee, or injunction) from the court to the bank to retain the deposit until the question was settled, unless bond of indemnity be given; but that if he did not within a reasonable time after notifying the bank proceed against the depositor directly, the bank would be released from any obligation to him, and might act as though it had received no notice of his claim.

§ 343. **The True Owner of a Deposit may recover from the Bank.** — The English cases at law hold that the true owner of the money cannot recover it in a suit against the banker, even after such notice. "It is impossible," says Mr. Grant, "for the banker to set up a *jus tertii* against the order of the customer, or to refuse to honor his draft, on any other ground than some sufficient one resulting from the act of the customer himself." [1] Though in equity the rule would appear to be different even in England.[2]

Even after a Creditor of the Depositor has Served Garnishee on the Deposit, Notice from the True Owner Holds it for Him, if a Bond is Given to the Bank

(*a*) In the United States, the question has been several times discussed in the courts of Pennsylvania, and the position there laid down gives the true owner a right to the fund, and power to maintain that right at law as well as in equity.[3] The best dis-

[1] § 343. Grant on Banking, ed. 1873, p. 148; see Sims *v.* Bond, 5 B. & Ad. 389; Tassell *v.* Cooper, 9 C. B. 509.

[2] See Pennell *v.* Deffell, 4 De G., Mac. & G. 372; Bridgman *v.* Gill, 24 Beav. 302.

[3] Frazier *v.* Erie Bank, 8 W. & S. (Pa.) 18; Stair *v.* York National Bank, 5 P. F. Smith (Pa.) 364; Farmers & Mechanics' National Bank *v.*

cussion of this matter will be found in Farmers and Mechanics' National Bank *v.* King, cited in the last note. In that case, the court even went so far as to say that, when the true owner notified the bank of his ownership only after the bank had been served with garnishee process in a suit against the depositors, still the true owner had the superior title, and might recover the money in proceedings in equity against the bank; for the attaching creditor of the depositor could acquire no better title than that of the depositor himself, and the depositor's title was liable at any time to be divested by notice from the true owner served on the bank. The same case gives the bank some comfort by the statement that, if either claimant sues the bank, the court will have, and will exert, as a general rule, the power to compel the plaintiff to execute to the bank a sufficient bond of indemnity as a preliminary to a judgment in his favor.

The Bank must not Take it upon Itself to Pay the Real Owner, Known only after Service

(*b*) An earlier case in the same State, commented upon and explained in the last-named case, was as follows. Process was served upon the bank as garnishee of the nominal depositor. Judgment was rendered in favor of the plaintiff. The bank, after service of the process, paid away all the money standing to the defendant's credit. Upon issue of *scire facias*, it sought to avoid its responsibility, on the ground that the money was not really that of this depositor, but that of an undisclosed principal, who found no fault with the subsequent payments. It seemed that this was really the case. But the bank's defence was not allowed to prevail, upon the ground that, at the time of service of process, and the accruing of the bank's duty to hold the money, the bank did not know that the fund did not belong absolutely to the depositor. The relations of all the parties *inter se* at the moment of service became fastened definitely, and remained throughout all the rest of the proceedings precisely the same. The bank then knew only the depositor; its duty then was only to pay to him or his order; the garnishment which found him the

King, 57 Pa. St. 202; Harrisburg Bank *v.* Tyler, 3 W. & S. (Pa.) 373; Bank of United States *v.* Macalester, 9 Pa. St. 475; Bessemer Savings Bank *v.* Anderson, 134 Ala. 343, 32 So. 716, 92 Am. St. Rep. 38 (1901). See an *obiter* remark in Miller *v.* Receiver of the Franklin Bank, 1 Paige (N. Y.) 444.

apparent owner kept him such, without regard to subsequent knowledge obtained by the bank. Wherefore, the plaintiff was entitled to the money, and must, under the circumstances, take it from the funds of the bank.[4]

(*c*) In Kansas the court held that, where a person holding money in a fiduciary capacity deposited it in his own personal deposit account, the equitable owner could maintain his claim to it against a creditor of the depositor who had garnished the depositor's general account.[5]

The owner may litigate his claim even after the agent has secured judgment against the bank for the payment of the money.[6]

The tendency of courts is in favor of enforcing the contract made by the bank with the depositor, and where an agent advances money and deposits it in his own name the principal cannot recover the fund from the bank.[7]

§ 344. **A New York Case. Checks Drawn. Injunction. Presentment of First Check. Lunacy. Payment to Committee. Presentment of Second Check.** *A payment otherwise good is not invalidated by an adverse claim unknown to the bank at the time of payment; and a bank is not obliged to look into the equities of a checkholder. The suit should be between the substantial parties.* — Certain money of B. *was at his request deposited with a bank by V., who however did so in his own name* to the credit of a deposit account he then had with the bank, giving to B. two checks for the amount, which B., February 22, 1869, indorsed and delivered to H. as part consideration for H.'s promise to marry him. In a proceeding *de lunatico inquirendo* instituted next day, it was adjudged that B. was then, and for six months had been, of unsound mind. Pending the proceeding, the bank was enjoined from paying over the money to any one, and on March 31 was ordered to pay the same to B.'s son, the committee appointed, and on April 15 complied. On March 6, the larger check was presented for payment and refused. On March 8, B. married H. On August 28, 1871, the smaller check was presented and refused.[1]

[4] Jackson *v.* Bank of the United States, 10 Pa. St. 61; explained and commented on in Farmers & Mechanics' National Bank *v.* King, 57 *id.*, 202.

[5] Morrill *v.* Raymond, 28 Kan. 415; citing Central National Bank of Baltimore *v.* Connecticut Mutual Life Ins. Co., 104 U. S. 54, 26 L. ed. 693.

[6] Spaulding Mfg. Co. *v.* Chaudoin, 87 Ark. 418, 112 S. W. 1087 (1908).

[7] Nolting *v.* National Bank, 99 Va. 54, 37 S. E. 804 (1901).

[1] § 344. Viets *v.* Union National Bank of Troy, 101 N. Y. 563, 5 N. E. 457; reversing 31 Hun (N. Y.) 484, and citing Van Allen *v.* American

The bank could not pay the money during the injunction, and when the committee presented authority from the court to receive the money, the bank acted properly in paying to one who had apparent authority to receive.

"It must be conceded that, if the adjudication of lunacy was in force at the time the payment was made, it was a valid and legal payment, and an effectual bar to any claim by the plaintiff, or any other person to recover the money of the defendant."

As the money was the property of B. when deposited, it remained the property of B. and the payment was actually correct and legal. Even if H. had an equitable claim, it was unknown to the bank, and any equitable right should be enforced against the committee, not against the bank, which could not be expected to look into the equities between third parties before paying upon order of the court.[1]

National Bank, 52 N. Y. 1, and Bank of British North America *v.* Merchants' National Bank, 91 N. Y. 106. The judges disagreed as to the grounds of the decision.

CHAPTER XXIV

ATTACHMENT AND INJUNCTION

§ 346. A deposit is subject to attachment by the creditors of the owner, but a deposit is not attachable as the property of the nominal depositor, if it is shown that he is not the real owner.
After certification of a check, the amount covered by it is beyond the reach of creditors of the drawer.
And where a check is an assignment, a bank may, after service, pay checks actually *drawn before service.*
Proceeds of collection in the hands of a sub-agent may be attached by a creditor of the real owner.

§ 346 A. The attaching creditor is in no better position than his debtor as to the deposit.

§ 347. Injunction upon bank.

§ 346. **Attachment.** — A creditor of him who has title to a deposit may attach the same, and an attachment holds all money of the debtor in the hands of the trustee or bank at the time of service, and also what may come to his hands afterward, at any time before judgment; and it makes no difference that the money is deposited for the use of C. unless there is some privity of contract between C. and the depositary, for a deposit does not become C.'s property until his assent or privity arises.[1]

Borrowed money can of course be attached as well as any other, for it is the property of the borrower.[2]

A depositor, A., sometimes places money of B. in his (A.'s) name, with B.'s connivance, to prevent the creditors of B. from reaching it; but a creditor of B. will not be prevented from taking the fund, if he can show that it is really B.'s property, though it

[1] § 346. Nicholson *v.* Crook, 56 Md. 55. See First National Bank *v.* Jaggers, 31 Md. 38; Farmers & Merchants' Bank *v.* Franklin Bank, 31 Md. 404; People *v.* Johnson, 14 Ill. 342; Kelly *v.* Roberts, 40 N. Y. 432; Brown *v.* Foster, 4 Cush. (Mass.) 214; Baker *v.* Moody, 1 Ala. 315.

[2] Fuller *v.* Randall, 1 Gray (Mass.) 608.

has been held in New York that a sheriff could not levy on such a deposit as though it were B.'s.[3]

From the time of service an attachment or garnishment is a lien that no act of the bank or depositor can shake off without consent of the creditor.[4]

Of course the attachment can only affect funds belonging to the debtor, and if a check has been certified before the service, the amount covered by the check is not affected by the garnishment; but an acceptance away from the bank by the cashier is not good, nor a promise by a bank clerk that a check shall be paid, and such acts do not remove any portion of a deposit from the attacks of creditors.[5]

Payment of Checks after Service of Attachment

Where a check is an assignment by the law of a State, an attachment does not take precedence of checks drawn before service, and the bank may pay such checks though presented after service,[6] but it should be careful to assure itself that the check is not of a subsequent drawing and merely antedated.

In those States, as Pennsylvania, where a check is not an assignment, the bank cannot pay any checks after service.[7]

Creditor of Depositor may Attach Proceeds of Collection in Hands of Sub-agent

S. in England drew on N. in New York, and S.'s banker, M., sent it to the F. Bank of New York to collect. N. began a suit against S., and when the draft became due paid it, and at once attached the proceeds in the hands of F. F. claimed that the money was due from it to M., its principal, and could not be attached in its possession as the money of S. The court held, however, that the attachment was good.[8]

[3] Greenleaf *v.* Mumford, 50 Barb. (N. Y.) 543. But see Mechanics & Traders' Bank *v.* Dakin, 50 Barb. (N. Y.) 593 (1867), and cases cited; Lawrence *v.* Bank of Republic, 35 N. Y. 320 (1867); Mechanics & Traders' Bank *v.* Dakin, 28 How. Pr. (N. Y.) 502 (1864).

[4] National Commercial Bank *v.* Miller, 77 Ala. 168.

[5] Bullard *v.* Randall, 1 Gray (Mass.) 605; Duncan *v.* Berlin, 60 N. Y. 151.

[6] National Bank *v.* Ind. Bank Co., 114 Ill. 483, 2 N. E. 401; Reeve *v.* Smith, 113 Ill. 47. See Boswell *v.* Citizens' Sav. Bank, 123 Ky. 485, 96 S. W. 797 (1906).

[7] Harry *v.* Wood, 2 Miles (Pa.) 327.

[8] Naser *v.* First National Bank, 36 Hun (N. Y.) 343.

§ 346 A. An attachment or judgment lien does not take precedence of a prior unrecorded deed or mortgage, whether the creditor had or had not notice of such unrecorded conveyance at the time of levying his attachment, or docketing his judgment.[1] A creditor of a depositor, who attaches money to the credit of his debtor in bank, is in no better condition than the depositor. If an agent mingle his principal's money with his own, so that it cannot be followed, the principal cannot recover it specifically; but the agent does not thereby convert himself into a mere debtor; the principal may claim from the admixture the sum which belonged to him. A collector of rents deposited money of his principal in a bank in his own name; it was attached by a creditor of the depositor, and immediately afterwards notice of ownership, etc., was given by the principal. *Held*, that the attaching creditor stood in the position of the depositor, and could recover only what the depositor could.[2]

A deposit by a corporation in a bank is a debt by the bank to the corporation, and is liable to attachment by a judgment creditor of the corporation. A corporation making a deposit is on the same footing with the bank as is an individual. Where it is satisfactorily shown that money deposited in the name of one person is the property of another, it cannot be attached as the property of the depositor.[3]

A creditor who is a party to a trust for the benefit of creditors, the trustees under which were not to make a payment until the property was sold and the trust executed, has no legal right to the funds in the hands of the trustee, before the disposition of the whole trust property. A merely equitable right is not attachable by trustee process.[4]

§ 347. **Injunction upon Bank.** — If enjoined from paying, of course the bank must wait till the question of title is settled, before paying.[1]

[1] § 346 A. First National Bank *v.* Hayzlett, 40 Iowa 659; Lamberton *v.* Merchants' National Bank of Winona, 24 Minn. 281.
[2] Farmers & Mechanics' National Bank *v.* King, 57 Pa. St. 202.
[3] Farmers & Mechanics' National Bank *v.* Ryan, 64 Pa. St. 236.
[4] Massachusetts National Bank *v.* Bullock, 120 Mass. 86.
[1] § 347. Springfield Marine & Fire Ins. Co. *v.* Peck, 102 Ill. 265.

CHAPTER XXV

CLEARING-HOUSE

§ 349. Daily Routine.

Effect of Clearing-house Rules.

§ 350. (1) Non-members not bound, unless by agreement with special
§ 351. reference to the rules (as where a non-member bank employs
§ 351 *d*. a member bank to make exchanges through the clearing-house for it), or by a course of dealing. Nor can a non-member or any outside party take advantage of the rules,
§ 351. and the liabilities or forfeitures for which they provide.

(2) Members are bound by the rules as by contracts. Unless they
§ 352. expressly declare that common law rights for the correc-
§ 353. tion of mistakes, etc., are forfeited by breaking the rules of the clearing-house, such rights will still exist, but the bank in fault will have to answer to any member that is damaged by reason of the breach of clearing usages or regulations.

For example, a dishonored check or note may be returned after the hour set in the clearing-house rules (unless the rules expressly declare that such right is forfeited), and if the bank that sent the paper through the clearing-house has not altered its position to its injury, in consequence of there having been no return within the usual hour, no damage is done, and the rights of the parties are the same as if there were no such limitation of time. But if the hour set for the return of paper arrives without such return, and the sending bank credits or pays the depositor of the paper, or it has in any way altered its position, or may be at any loss which might possibly have been avoided by a return within the hour, the defaulting bank must bear the loss.

§ 353. Notes.

Payment of, through the clearing-house.

In the absence of evidence of uniform usage to regard the presentation of notes through the clearing-house as a demand for immediate payment, just like checks, such presentment is equivalent to leaving the note for collection at the bank where payable. The maker has all the business hours in which to pay, and the bank is in no fault if it returns the note as soon as it is sure that it will not be paid.

§ 354. If there are insufficient funds to pay all the demands at one clearing against a given deposit, the bank cannot pay any of them. *Quære*, whether it would not be better to es-

tablish a power of paying those of the earliest date in their order, as far as possible. When the test of prior presentment fails, some other should be provided.

§ 351. A Construction of Rules.

§ 349. **Payments through the Clearing-house.** — In all large cities where the banking business is sufficiently considerable to demand such a convenience, "clearing-houses" are established. The main purpose of these is to render the daily settlements of the banks with each other simple and expeditious. The substantial characteristics of the plan are these. At a certain hour every morning, usually at ten o'clock, the deputy of each bank attends at the room of the clearing-house, bringing with him all the checks upon other banks which have been received by his own bank since the same hour of the preceding day. Each bank has its drawer or box in the room, and the messengers of all the other banks distribute all the checks which they have in their possession, placing each of them in the drawer or box of the particular bank upon which it is drawn. Each bank is then credited on the books of the clearing-house with the amount of checks upon other banks which it has brought in for collection, and is debited with the amount of the checks drawn upon it which all the other banks have brought. If the former amount exceeds the latter, the bank is then declared to have "gained" the amount of the excess; but if the latter amount exceeds the former, the bank is declared to have "lost" the amount of the difference. It is obvious that the sum total of the losses of the losing banks must be precisely equal to the sum total of the gains of the gaining banks. At a later hour in the same day the losing banks are obliged to bring into the clearing-house the sums which they have respectively lost; and shortly afterward the gaining banks come and receive from the officers of the clearing-house, out of the funds thus furnished by the losers, the amounts of their respective gains. In this manner the business of settling the daily balances and exchanges between the several banks is accomplished with extraordinary rapidity, accuracy, and cheapness. The computation of how much each bank has brought in against others, and of how much the others have brought in against it, is performed by skilful clerks in a very few minutes. So soon as it is finished, an officer of each bank takes from its drawer or box all the checks against it which have been placed therein by the other banks, and carries them back to his own bank to be examined, for the purpose of

seeing whether or not any of them must be dishonored by reason of want of funds of the drawer. The casting of the balances at the clearing-house is not of course, as it would be impossible that it should be, binding upon any bank as to the genuineness or the honoring of the checks which are placed in its drawer, and which purport to be honestly drawn upon it by depositors having funds. A time is therefore set within which each bank is expected to examine all such checks, and to return such as it refuses to pay. The computation already made at the clearing-house is not affected by the repudiation in this manner of checks by any bank. But each check before being placed in the box of the drawee bank is marked, for the purpose of identification, with the name of the bank presenting it through clearing; therefore the bank on which it is drawn and which refuses to pay it is able at once to send it back to the bank which brought it in, and to demand a repayment of its amount to be made. If the repayment is refused for any reason, the question lies wholly between the two banks, and the one on which the check was drawn has no means of satisfaction afforded by the clearing-house, but must bring its suit directly against the other.[1]

If both the bank collecting a check through the clearing-house and the bank upon which it was drawn understood that the receiving of the check through the clearing-house was not intended to constitute payment, it cannot be claimed by a payee and indorser of the check that there was payment.[2] Where the rules of a clearing-house provide that checks and drafts payable through any bank, a member of that institution, must be paid in accordance with its rules, and that any error or mistake must be corrected by the banks which were parties to the transaction, a note on one bank held by another, both of which dealt through the clearing-house through the agency of members thereof which was certified by mistake, its payment through the clearing-house was not a voluntary payment, so as to preclude a recovery of the money paid from the holder of the note.[3]

[1] § 349. Merchants' National Bank *v.* National Bank of the Commonwealth, 139 Mass. 513, 2 N. E. 89.

[2] Columbia-Knickerbocker Trust Co. *v.* Miller, 156 App. Div. 810 (1913), 142 N. Y. S. 440, affirmed in 215 N. Y. 191, 109 N. E. 179.

[3] Mt. Morris Bank *v.* Twenty-third Ward Bank, 172 N. Y. 244, 64 N. E. 810 (1902), affirming 60 App. Div. 205, 70 N. Y. S. 78.

Payment through the clearing-house amounts merely to a system of set-off and cancellations whereby accounts are settled between members

§ 350. **Effect of Clearing-house Rules.** — A clearing-house may be legally incorporated; but more commonly it is a mere private association organized among the banks to suit their own requirements and convenience. Of course the authority of such an association must be very limited.[1] In the absence of special legislation it is impotent by its own arbitrary and original power to alter any obligation of the common law. Neither has it any authority to bind banks which are not parties to the association by any by-laws, rules, or usages which it may see fit to establish. Some of the regulations of the clearing-house are embodied in by-laws, others are simple rules or usages which are adopted and tacitly acquiesced in by the members. There is no legal distinction between these two classes. When once the rule or usage has been established by satisfactory proof, it is as binding as the formal by-law.[2] The only practical difference is in the greater difficulty which must be experienced in proving with accuracy the existence and extent of the unexpressed custom.

§ 351. **Effect on Non-members.** — The by-laws, rules, and usages are binding only upon members of the association.[0] No

without the actual transfer of unnecessary funds. Crocker-Woolworth National Bank *v.* Nevada Bank, 139 Cal. 564, 73 Pac. 456, 96 Am. St. Rep. 169, 63 L. R. A. 245 (1903).

[1] § 350. Rules as to the effect of indorsement of negotiable paper are binding on its members. Crocker-Woolworth National Bank *v.* Nevada Bank, 139 Cal. 564, 73 Pac. 456, 96 Am. St. Rep. 169, 63 L. R. A. 245 (1903). In this case the constitution and rules of the clearing-house provided that negotiable paper payable to the order of a bank, and deposited for clearance, should be officially indorsed in writing by the original payee, but that negotiable paper deposited for clearance by a member should bear the stamp of the deposit bank which should be "For clearing house purposes only" and should guarantee the validity and regularity of indorsements and that the bank should file with every member a certified impression of its clearing-house stamp, and it was held that where a "raised" check payable to an individual and deposited by a bank with the clearing-house was stamped "Pay through clearing-house" there was no representation to the drawee that depositing bank claimed to be the owner; and in an action by the drawee to recover from the other bank it could show that it had acted merely as a collecting agent for the payee.

[2] See Crocker-Woolworth National Bank *v.* Nevada Bank, 139 Cal. 564, 73 Pac. 456, 96 Am. St. Rep. 169, 63 L. R. A. 245 (1903).

[0] § 351. National Exchange Bank *v.* Ginn & Co., 114 Md. 181, 78 Atl. 1026, 33 L. R. A. (N.S.) 963, n. (1910). See Crocker-Woolworth National Bank *v.* Nevada Bank, 139 Cal. 564, 73 Pac. 456, 96 Am. St. Rep. 169, 63 L. R. A. 245 (1903).

The rules are binding on non-members who clear through banks that are members. Mt. Morris Bank *v.* Twenty-third Ward Bank, 172 N. Y. 244, 64 N. E. 810 (1902).

outside bank is under any degree of obligation to observe them. But, on the other hand, no outside bank can have any remedy against any member of the association for a breach of them. They are in the nature of a contract to which the outsider is no party. The duty of adhering to them runs from each of the members to each and all the rest, but to no other person or corporation; at least unless any special and peculiar course of dealing between any member and any outside individual has operated to place that member under an express and exceptional obligation to the outsider to adhere in all matters in which he is interested to the regulations of the clearing-house. Generally, "those who are not bound by such usages, and have not contracted with reference to them, have no right to avail themselves of them to create an obligation against those who are parties to their adoption and bound by them *inter sese* only." But if any bank or person not a member of the association can show that, by virtue either of an express or an implied understanding, he did contract with a member "in reference to" such usages, he may hold the bank to the fulfilment of this special contract.

In general, if any person or bank employs a member of the association to transact any business, such employer is neither bound by the rules, nor entitled to take advantage of and enforce them as against other members, by reason of the fact that the agent is a member. The fact of the agency does not "bring the case within the operation of the rule, that the principal is entitled to the benefit of the contract of the agent, while transacting the business of the principal. This is undoubtedly true as to all the legal rights acquired by the agent for the benefit of the principal; but" the clearing-house rules are "a mere labor-saving usage, designed for the exclusive benefit of the agent, the adoption of which could not affect the principal without his assent."

(*a*) The foregoing principles were laid down in a very satisfactory opinion delivered by the Chief Justice of the Supreme Court of New Jersey;[1] and the facts of the case in support and explanation of which they were enunciated are well worth a brief recital. The plaintiff deposited in the Bank of Commerce in New York City a check drawn on the defendant bank, which was situated in New Jersey. The defendant of course was not itself a member of the New York clearing-house; but it had as its agent

[1] Overman *v.* Hoboken City Bank, 1 Vroom (N. J.) 61; 2 *id.*, 563.

in New York City the Ocean Bank, and it was wont to receive and pay checks drawn upon it through that bank. That bank was a member of the clearing-house, and used its facilities in transacting the business of the defendant bank. The check in question came from the Bank of Commerce through the clearing-house to the Ocean Bank. The rules of the clearing-house required that any check which was not to be honored must be returned before ten o'clock A.M. of the day following that on which it was received through clearing; otherwise the bank on which it was drawn would be held to pay it. If, therefore, this check had been drawn directly on the Ocean Bank, that bank must either have returned it before ten o'clock of the next day, or it must, according to the rules, have paid it. It was returned a whole day later than this limit, with the statement that it could not be paid since the defendant had no funds of the drawer. The plaintiff, who had lost the amount of the check by the intermediate failure of the drawer, sought to hold the defendant, on the ground that, since its agent was a member of the clearing-house and was uniformly wont to adhere to its rules and use its facilities in transacting the defendant's business, therefore the defendant was itself answerable for the agent's breach of such rules, and was itself liable to suffer for such breach according to the terms prescribed by those rules. Besides laying down the doctrine stated in the three preceding paragraphs, which directly militated against any recovery by the plaintiff, the court further criticised the sufficiency of the rule or usage which he set up, even if it could be applicable at all to the defendant bank, to cover the circumstances of this case. For the usage appeared to be that, where a check is presented at the clearing-house "to a bank against which the said check was drawn", then it must be returned within the prescribed time, or paid by such bank. But the proof in this case showed a presentation not "to the bank against which the check was drawn", but to an agent. "This is an essential difference. For such a purpose the agent does not represent the principal. The usage, if contemplating a presentation to the principal, may be reasonable, and very unreasonable if extending to the agent. The plaintiff has failed to bring his case within the usage." The soundness of these remarks will be seen at once, if we suppose the employing bank, the defendant in this case, instead of being close at hand in New Jersey, to have been situated in Boston, or Chicago, or Philadelphia. The New York agent cannot possibly know the state of the accounts

of the depositors in its principal's books. It cannot properly agree or refuse to pay checks drawn upon the principal, and some days must be consumed in the intercommunication; meantime the twenty-four hour rule, which appears to be arbitrary, would have concluded the distant bank from refusing to pay the check long before that bank was aware that such a check had been drawn. The practical *reductio ad absurdum* is obvious.

(*b*) The rights of a depositor in a member bank are not affected by the clearing rules.[2]

A Bank's Customers cannot Take Advantage of the Clearing-house Rules

(*c*) Nor can he take advantage of them. A note made payable at bank A. was discounted by bank B. When it fell due, B. charged the amount to A., and forwarded the note, through the clearing-house, to A. for payment. The teller of A., under the mistaken impression that the maker of the note had sufficient funds on deposit for its payment, stamped upon the face of the note the word "Paid." Later in the day, discovering his error, he sent word to B., and also to the indorser of the note. The note was duly protested. B. then sued the indorser, who, upon the foregoing facts, set up payment by A., and endeavored to take advantage of the clearing-house rules. But the court held that there was no payment, and that the plaintiff should recover.[3] The customers of a bank are not parties to the clearing-house rules, and cannot avail themselves of any violation of such regulations.

A Member as Clearing Agent for Non-member

(*d*) But when a bank which is not a member of the clearing-house gives authority to one that is a member to act for it in making exchanges through the clearing-house, the first is bound as to third parties by the acts of the agent bank under the said rules.[4]

[2] Merchants' National Bank *v.* National Bank of the Commonwealth, 139 Mass. 513, 2 N. E. 89.

[3] Manufacturers' National Bank *v.* Thompson, 129 Mass. 438.

[4] Stuyvesant Bank *v.* National Mechanics' Banking Association, 7 Lans. (N. Y.) 197. See Mt. Morris Bank *v.* Twenty-third Ward Bank, 172 N. Y. 244, 64 N. E. 810 (1902).

And if the non-member contracts with the member in such a way as to make the rules of the clearing-house a part of the contract the parties

§ 351 A. **Construction of Rules.** — The constitution of the New York clearing-house provides that all checks, drafts, or items in the exchanges reported not good or missent shall be returned the same day to the bank from which they were received, and the said bank shall immediately refund to the bank returning the same the amount which it had received through the clearing-house for said checks, drafts, or items so returned. A later provision requires, in case of failure of any bank, to promptly refund to the bank holding paper returned as not good, that such bank report the fact to the manager of the clearing-house, who shall thereafter, with the approval of the clearing-house committee, readjust the clearing-house statement, and declare the correct balance between such banks, provided such report be rendered before one o'clock of the same day.

The court held that the later provision did not repeal the first provision, so that a bank charged by the clearing-house with the amount of the drafts or checks returned as not good can allow such charge to stand against it in the account of the clearing-house, and seek reclamation directly from the bank required to refund such amount under the direct rules of the clearing-house.[1] A check is "not good" within the meaning of the clearing-house rules providing that checks returned as not good shall be returned before three o'clock of the same day to the members from whom it is received, where the drawee refuses to pay it and a memorandum on a check "assigned" together with a notice of insolvency of the drawee is a sufficient notice that the check was returned as "not good."[2]

are bound by the rules of the clearing-house; and the member cannot refuse to clear for the non-member until notice is given in accordance with the rules of the association, even though the non-member has become insolvent and has passed into the hands of the superintendent of banks. But for such clearances the member is entitled to appropriate a sufficient amount of the cash and securities of the non-member which it has in hand to protect itself, in accordance with the terms of the contract entered into when the non-member was solvent.

The member is also entitled to protest fees incurred in protesting the redeemed checks when such protest is made at the request of the superintendent of banks, and is further entitled to reasonable charges for counsel fees in collecting the bills receivable. Davenport *v.* National Bank, 127 App. Div. 391 (1908), 112 N. Y. S. 291, affirmed in 194 N. Y. 568, 88 N. E. 1117.

[1] § 351A. Mt. Morris Bank *v.* Twenty-third Ward Bank, 172 N. Y. 244, 64 N. E. 810 (1902), affirming 60 App. Div. 205, 70 N. Y. S. 78.

[2] Columbia-Knickerbocker Trust Co. *v.* Miller, 156 App. Div. 810, 142 N. Y. S. 440 (1913), affirmed in 215 N. Y. 191, 109 N. E. 179.

§ 352. **Effect of Clearing-house Rules as between Members.** *They are in the nature of contracts, and, unless they declare distinctly that common law rights are forfeited, a bank violating a clearing-house rule will still have its common law rights, but must answer for any damage caused to another member by the violation.* — In Massachusetts [1] a case arose between two banks, both members of the clearing-house. The rule on which it was based was embodied in a formal vote or article of the association, in the words following, to wit: "Whenever checks are sent through the clearing-house which are not good, they shall be returned by the banks receiving the same to the banks from which they were received, as soon as it shall be found that said checks are not good, and in no case shall they be returned after one o'clock." The plaintiff bank returned the check, as dishonored, to the defendant bank, which had presented it at clearing; but the messenger carrying the check did not arrive at the rooms of the defendant bank until five or seven minutes after one o'clock. The bank sent the messenger out in time, but he mistook his errand and went to the wrong bank first. The defendant bank, on the ground that the return was made too late, under the rule, refused to take back the check or to refund its amount. It did not appear, however, that the position or relations of the defendant bank to the drawer had undergone any change in the few minutes that had elapsed since one o'clock. It would have been no worse off if it had consented to receive back the check at five minutes after one, than it would have been had it been obliged under the rule to receive it back at five minutes before one. The court took the view that the articles of association were in the nature of a contract between the members. If the plaintiff had not kept the check so long that it would at common law be held to have adopted it and assumed to pay it, the power to refuse to pay it, and to return it, still existed, and could be affected by the rule of the clearing-house association only so far as it should appear that the defendant bank had suffered actual injury by reason of the delay. To the extent of such actual injury it seems that the defendant bank might be entitled to a set-off against the sum due from it on the check. Or it might pay the check, and then sue for damages for the injury caused to it by the failure of the returning bank to observe the terms of the agreement between them, and to return before one o'clock.

[1] § 352. Merchants' National Bank *v.* Eagle National Bank, 101 Mass. 281.

This case was subsequently discussed and affirmed by the same court. The check in this latter case was returned at half-past one o'clock, with a statement that it had been retained and treated as good under a mistake of fact, and that it was not good. The bank which had presented the check had not changed its position in any respect during the intervening half-hour, and therefore really suffered nothing by the return of the check. The court said that the limitation of time was only for the protection of the presenting bank; it was the establishment of a certain hour, after which hour the presenting bank, in the absence of notice to the contrary, might assume the check to be good, and would be protected in acting on that assumption. But if it had taken no action on that assumption, then it had no need of protection, and was not prejudiced by the return of the check. For, said the court, the rule of the clearing-house does not say that the paying bank shall have no right of reclamation after that hour, and shall thereafter forfeit or lose the rights which it would otherwise possess. Upon this ground, this decision might, perhaps, be distinguished from the decision in Preston *v.* Canadian Bank of Commerce,[2] which otherwise certainly is directly contrary to the Massachusetts doctrine.[3]

It is also said that the mere fact that the presenting bank has credited the amount of the check to the depositor, upon its general account with him, does not constitute such an act on its part as prevents the return of the check after one o'clock. This fact does not make the depositor liable instead of the bank. But ap-

[2] 23 Fed. 179. See National Bank of Commerce *v.* Mechanics' American National Bank, 148 Mo. App. 1, 127 S. W. 429 (1910), holding that if checks are not returned by the time agreed upon the bank which does not return them in time is chargeable with the consequences of a disregard of the rule and cannot recover the amount paid thereon though the checks were forged and no harm resulted, or though they came in such numbers that there was not time for examination. But in New York it is held that a bank which does not return a check before three o'clock in accordance with the rules of the clearing-house does not entitle a bank which has received payment on a bad check to refuse to refund the money, if the drawee promptly made an effort to return the check within the time, but was unable to do so because of the distance, and the bank receiving payment has not been charged to its detriment because of the delay. Citizens' Central National Bank *v.* New Amsterdam National Bank, 128 App. Div. 554 (1908), 112 N. Y. S. 993, affirmed in 198 N. Y. 520, 92 N. E. 1080.

[3] Merchants' National Bank *v.* National Bank of the Commonwealth, 139 Mass. 513, 2 N. E. 89. See also National Exchange Bank *v.* National Bank of North America, 132 Mass. 147.

parently it might be different if the bank had given any fresh and original credit to the depositor upon the strength of the check.[4]

In Preston *v.* Canadian Bank, Judge Blodgett said that Massachusetts overlooked the right of the parties to agree on a time of return. Massachusetts replies that she does not overlook such right, but interprets the agreement in the light of its object and reason; viz. to protect the creditor bank in any action it may take in treating the check as paid after the agreed hour. As, for example, by paying over the money to the depositor of the check; but as the creditor bank had not in any way substantially altered its position, the money paid under mistake of fact could be recovered.

The Loss must Fall on the Bank that has Failed to Comply with the Rules to which it has Agreed

C. deposited collaterals with a banking firm which was a member of the Chicago clearing-house, arranging to draw checks to within ten per cent of their value. On August 5 he drew his check for $4000, which was deposited with the Canadian Bank of Commerce (also a member of the clearing-house) to his credit, and went into the exchanges for collection through the clearing-house on the morning of August 6. The rules required each member to pay its balances by twelve o'clock, and any check found not good when returned to the drawee bank was to be returned to the bank which collected it through the clearing-house by half-past one o'clock of the same day. When C.'s check was returned from the clearing-house to the firm, the collaterals were deemed sufficient to pay this and other checks drawn by him on the firm; and they were handed over to the bookkeeper to be charged upon his account. At forty-two minutes past one, the firm heard that C. had failed, when a second examination of his account disclosed a mistake in the first, whereupon the check was sent to the Canadian Bank, and payment demanded at fifteen minutes before two, and refused. *Held*, that the firm could not recover of the collecting bank. The parties had agreed upon the time within which mistakes could be corrected, and the loss must fall on the one who had failed to fulfil the contract.[5]

[4] *Ibid.*

[5] Preston *v.* Canadian Bank of Commerce, 23 Fed. 179 (1883).

Payments by Mutual Credits at the Clearing-house cannot be Revoked after Hours to the Detriment of Another Bank

The M. bank, at nine o'clock one morning, produced $3,700.86 worth of checks against the L. bank, and the latter $4,967.57 worth against the M. Mutual credits were given. The rule of the clearing-house of which M. and L. were members was that any bank unable to pay must notify the manager of the clearing-house and the other banks by ten o'clock, and hold in trust the checks it had received from other banks at the morning exchange. The M. bank on the morning mentioned above could not pay; but, hoping to retrieve its fortunes, neglected to give notice, and, acting on its silence, the L. credited to each depositor the checks upon M. which it had received and exchanged. The court held, in an action by M.'s receiver, that L. had a right to act on the silence of M., and that, independently of any clearing-house rules, the mutual payment of checks by exchange of those on one bank against those on the other could not be revoked by either to the detriment of the other, or of the depositors for whom that other was acting, and to whom it had given credits.[6]

If the rule or agreement goes so far as to declare in terms, as was the fact in the New Jersey case, cited in § 359, that, if the returning bank does not return before the hour named, it shall altogether forfeit the right to return at all, and shall be held to pay the amount of the check, the entirely different terms of the contract will raise an entirely different issue. That a usage, or even a by-law, to this effect would be regarded as in derogation of the common law, in that it would undertake to make a bank pay the check of a drawer who had no funds to his credit, and that therefore the plaintiff would be held to make out his case with great strictness, may be gathered from the language of the New Jersey court. But from the same case it may also be gathered that if the plaintiff should succeed in sufficiently proving his case, the court would not deprive him of a favorable decision. Certainly there would seem to be no ground on which the courts could reasonably undertake to annul a positive and definite agreement voluntarily entered into between parties of high intelligence, and believed to work to the common advantage of all concerned.

A usage among the banks in the clearing-house at London to return checks at any time before five o'clock, P.M., even

[6] Blaffer *v.* Louisiana National Bank, 35 La. Ann. 251 (1883).

if they have been cancelled for payment in the usual manner, by drawing a line through the drawer's signature, provided the words "Cancelled by mistake" are noted upon them, has been recognized by the English courts as good and binding.[7]

§ 353. **Payment of Notes through the Clearing-house.** *A note sent through the clearing-house may be returned after the hour set in the rules.* — The rules of an association of banks organizing a clearing-house for the purpose of effecting exchanges between themselves at one time and place daily, and the payment at the same place of the resulting balances, fixed a time before noon for making exchanges at the clearing-house, and a time between noon and one o'clock for paying balances there. The practice under the rules was for the exchanges and payments to be made according to tickets accompanying vouchers presented for exchange, and not from an examination of the vouchers themselves in detail. The rules also provided, that errors in the exchanges should be adjusted directly between the banks; and that, whenever checks which were not good should be sent through the clearing-house, the banks receiving them should return them to the senders as soon as it should be found that they were not good, "and in no case shall they be retained after one o'clock." *Held*, in the absence of evidence of a uniform custom among the banks which were members of the clearing-house, to treat notes the same as checks, that the sending of a note through the clearing-house to a bank at which it was payable was not a formal demand for immediate payment made during business hours, but was equivalent to leaving the note at the bank for collection from the maker on or before the close of banking hours; and that the payment of such a note at the clearing-house was a provisional payment only, which became complete when the note was paid in the usual and ordinary course of business, and if not so paid the payment at the clearing-house was to be treated as a payment made under a mistake of fact, to the same extent and subject to the same right of reclamation, although the note was retained until after one o'clock, as if it had been made without the intervention of the clearing-house. *Held, also*, that even if the bank at which the note was payable had funds of the maker of the note on deposit, the retention of the note until after one o'clock did not amount to payment, in the absence of evidence that the maker had authorized the bank to pay his notes out of his money or deposit.

[7] Fernandez *v.* Glynn, 1 Camp. 426, n.

"The sending of such a note through the clearing-house, not accompanied by any special demand of payment, can give no greater rights to the bank that sends it than if the note had been left at the bank where payable, without any demand for payment, or any instructions in relation thereto. In such a case the maker would have, during business hours, to pay the note, and the bank would be in no default if it returned the note as soon as it became certain it would not be paid.

"A messenger was sent, before two o'clock, with the notes to each of the defendant banks, reached each bank before it had closed, and demanded in each case the amount which the plaintiff had paid through the clearing-house, and tendered back the note; but payment was refused by the defendant banks, on the ground that the notes were returned too late, that they should have been returned before one o'clock. We fail to find any laches on the part of the plaintiff; and, on the facts presented, no injury resulted to the defendants because the notes were not returned earlier. Carrick, Calvert, & Co. had money on deposit in the plaintiff bank that day, but not enough to pay all their notes made payable that day at its counter." [1]

A custom of banks sending notes through the clearing-house by which the time is fixed when the conditional payment, resulting from such notes going through the clearing-house, becomes absolute in case the note sent is not returned is valid.[2]

§ 354. **Checks sent through the Clearing-house. — Insufficient Funds.** — The payment of checks may be affected by the use of the clearing-house in one important particular. Checks, as has been seen, must be paid in the order of presentment. But when the deputy of the bank takes from its drawer in the clearing-house all the checks which it has to pay, he may receive a considerable number of checks of the same depositor. It is clear that there can be no priority among these. They are all received at precisely the same moment. For the order in which they are placed in the drawer has nothing to do with the presentment of them to or receipt of them by the bank, indeed is in nearly all cases unknown to the bank. The bank cannot look at their dates; for priority of presentment, not of date, secures priority of pay-

[1] § 353. National Exchange Bank *v.* National Bank of North America, 132 Mass. 147, 151.

[2] Atlas National Bank *v.* National Exchange Bank, 178 Mass. 531, 60 N. E. 121.

ment. So if the bank cannot pay all the checks of any individual depositor then coming through clearing, it must pay none of them. It has no legal power or right to select or choose from among them certain ones which it will honor, or certain ones which it will dishonor. All or none must be paid. Any other course would render the bank liable to the holders of the dishonored paper. A check presented at the counter for payment must be paid at once, if there are funds enough to the drawer's credit to pay it alone; but if it is sent through clearing it must take its chance that his funds shall be sufficient to pay not only it, but all his other checks which shall be sent through clearing on the same day; and failing this, it must be dishonored.

It might seem advisable to incorporate in clearing-house transfers a rule, that, if the funds of a depositor are insufficient to pay the whole of a mass of checks coming against it at one clearing, the bank should pay those of earlier date so far as the funds will go. Such a rule, though leaving some checks out in the cold, would seem better, as creating less disturbance of business calculations, than to refuse payment of the whole group. If a hundred or a thousand men try to enter a hall and get crowded in the way so that none can enter, a benevolent policeman would not make this an excuse for sending them all away entirely, but would straighten out the column, and let them enter in file, so far as the hall would hold them.

That the system of presentment through the clearing-house is a legal presentment for payment, to the bank on which the check is drawn, — a matter which it would seem could never be doubted, — has been specifically ruled in England.[1]

When a bank fails and the clearing-house, having notice of the failure, returns all of the debit items to the other banks it cannot apply the credit items to payment of claims of other banks against the insolvent bank. It is its duty to pay those funds over to the trustee in bankruptcy in order that preferences may not be collected.[2]

§ 355. **Appropriation of Payments made by the Bank.** — At any time it is only the balance of all the items up to that date that the customer can recover from the bank, or for which he can draw

[1] § 354. Reynolds *v.* Chettle, 2 Camp. 596.

[2] Rector *v.* City Deposit Bank, 200 U. S. 405, 50 L. ed. 527, 26 Sup. Ct. 289 (1906); Rector *v.* Commercial National Bank, 200 U. S. 420, 50 L. ed. 533, 26 Sup. Ct. 294 (1906).

his checks upon it. It is the first item on the debit side that is discharged or reduced by the first item on the credit side, without regard to the identity or disparity of any particular sums.[1] Simple as this principle appears, it is sometimes the only thread which can show the way out of complicated labyrinths, as is well shown by the cited case of Devaynes *v.* Noble. There the partner in a large banking-house died. The business was continued without any real, or even formal change. Some customers knew of the death, some did not. The daily course of the business continued in all respects as before, till the house failed. Then various customers sought to hold the estate of the deceased partner to satisfy their deficits. The question was on what principle the accounts should be made up; for no hesitation was expressed as to the necessity of subjecting the estate to meet the unsatisfied claims of all persons who were customers at the time of the death of the deceased. Since then some had increased, and others had decreased, the amount of their deposits; members of each of these classes had received credits to the amount of their balances at the time of the death; other members had not. The arguments of counsel were very long and ingenious; the court gave the matter the most serious consideration, but regarded no solution as possible save that of a simple running account. It decreed that every payment made to each customer since the death should be applied in reduction of the debt or balance owing to that customer at the time of the death, and this equally (1) where the customer had since made no deposit, but simply drawn checks; (2) where the customer had continued to deal with the firm depositing and checking, but on the whole increasing his balance; and (3) where, dealing in like manner, he had decreased his balance. The principle was stated to be unalterable, that each payment to the customer should be referred back and set against the earliest indebtedness to him; that the rule of law, sometimes laid down, that, if at the time of the payment the debtor neglects to appropriate it, the creditor may afterwards appropriate it to suit his own wishes, cannot be allowed to govern in cases of banking; but that in this business, in the absence of express contemporary arrangement or understanding, it will be considered that the appropriation of

[1] § 355. Devaynes *v.* Noble, 1 Mer. 541; Bodenham *v.* Purchas, 2 Barn. & Ald. 39; Henniker *v.* Wigg, 4 Q. B. 792; Concord *v.* Concord Bank, 16 N. H. 26; Commercial Bank of Albany *v.* Hughes, 17 Wend. (N. Y.) 94; Clayton's Case, 1 Mer. 608.

each payment to the discharge of the earliest then subsisting indebtedness is in fact made by the very act of setting down the two items in their order in the account. To the same purport also was Clayton's Case, where, however, the intention of the depositor was considered to be more clearly established, because, after the death of a partner in the banking firm, the depositor continued to draw checks against the sum to his credit at the time of the death.

A lawyer deposited on general account in his own name £5000 of his client's money; after drawing more than £5000 and the balance he had previous to that deposit, he died leaving a deposit of £2700. This the client claimed as a trust fund, but the court held that the payments by the bank must be appropriated to the sums paid in by the depositor in the order of the latter, and therefore the trust money had been all drawn out.[2] So far as the report shows, no effort was made to see if the payments could be accounted for without subtracting from the trust money; the accounts were lumped and the rule of Clayton's Case appears to have been strictly applied.

But in Maine it has been held that, if one draws a check against a fund composed partly of his own money and partly of money of another, the presumption is that he is drawing his own money.[3]

And in England it has been held that, where money is held by a person in a fiduciary capacity, though not strictly as a trustee, if he mixes it with his own in bank he will be taken to have drawn his own in preference to the trust money, and the rule in Clayton's Case will not apply.[4]

[2] Brown *v.* Adams, L. R. 4 Ch. App. 764 (1869); Pennell *v.* Deffell, 4 D. M. & G. 372.

[3] Hall *v.* Otis, 77 Me. 122. See Widman *v.* Kellogg, 22 N. D. 396, 133 N. W. 1020, 39 L. R. A. (N. S.) 563, n. (1911); Emigh *v.* Earling, 134 Wis. 565, 115 N. W. 128, 27 L. R. A. (N. S.) 243, n. (1908).

[4] *Re* Hallett's Estate, Knatchbule *v.* Hallett, 13 Ch. D. 696 (1879).

CHAPTER XXVI

OVERDRAFTS

Are irregular loans. Power to grant.
§ 357. Bank officers have no inherent power to make such loans, and even a usage to the effect of giving such power is bad.
§ 358. It is part of the management, and belongs only to the directors. May be a fraud upon the holder of an overdraft, if he is not informed of its character at the time he accepts.
§ 359. But not on the bank, for it has means of ascertaining the fact as to sufficiency of funds by ordinary diligence, and if it relies on the representation of sufficient funds implied by drawing a check, it is its own folly. This view, however, seems not to be without dissent.
§ 360. The bank may recover from the drawer any over-payment made upon his order.

§ 357. **Overdrafts.**[0] — It is not an uncommon thing for a depositor to undertake to overdraw his balance; and if he be a depositor in good standing and repute, and a good customer of the bank, his overdraft may very probably be honored by it. Of course such a payment is made by the bank wholly upon its own risk, and in sole reliance on the ability of the drawer to make remuneration. In fact, it is nothing else but a loan,[0a] and a loan of a very dangerous and irregular description, wherein the bank has no security whatsoever beyond the right of action against the drawer.

[0] § 357. An overdraft arises where a customer of a bank draws from it more money than is standing to his credit in his account with it. State *v.* Jackson, 21 S. D. 494, 113 N. W. 880 (1907).

[0a] Hennessy Bros. *v.* Memphis National Bank, 129 Fed. 557 (1904).

An overdraft of a treasurer of a borough is a loan to the treasurer and not to the borough. Pittsburg *v.* First National Bank, 230 Pa. St. 176, 79 Atl. 406 (1911); also an overdraft by an agent not authorized to draw is a loan to the agent. Merchants' National Bank *v.* Nichols, 223 Ill. 41, 79 N. E. 38, 7 L. R. A. (N. S.) 752 (1906).

An overdraft may be legal or it may be criminal, dependent upon the intent of the person committing it. United States *v.* Heinzie, 161 Fed. 425 (1908).

A cashier who reports to the state examiner an overdraft as a loan makes a false report, since his reports must agree with the books of the bank in the statement of assets, liabilities and names by which they are

If a cashier, not authorized, as cashiers seldom are, to loan the funds of the bank, or if the paying teller, who probably never has such authority, pay the overdraft of a customer without specific power from the government of the bank, but simply of his own individual motion, his act is, in the eye of the law, a breach of his trust.[0b] They have used the funds and property of the bank in a manner which the law does not authorize, and in which they have not even a color of right to use them. They have imperilled the safety of corporate money by loaning it, and the fact that it is to a customer whom they believe to be rich and honest, and a man whom it is desirable to favor, does not prevent the transaction from being a transgression beyond the limits of their power and duties.[1] They probably would not dream of discounting of their own sole motion the same customer's note, or making him a formal loan, even with security; yet here they in fact make him a very informal and irregular loan without security. The fact that in banking business such things are often done, and that their true character is hardly recognized or appreciated by the actors in them, is perhaps a moral extenuation, but it is certainly no legal excuse. The language of the adjudicated cases is not capable of being explained away. Such a course of dealing, long carried on by a cashier or teller with the knowledge and express or tacit approval of the bank directors, may possibly relieve him from liability to them. This is another and collateral question, by no means devoid of doubt and difficulty. But however such a usage or course of dealing may operate between the individual officer and the bank government, it is not allowed to be introduced in any other connection, for the purpose of rendering valid by virtue of business usage an act which the law directly makes wrongful. Evidence of such a usage will be ruled out. For however common the practice might be shown to be, it is yet a usage intrinsically bad and illegal, and which no court of justice will recognize.[2]

§ 358. **Overdrafts may be arranged for.** — Of course, however, there is a power in the bank to allow overdrafts. By negotiating

called. State *v.* Jackson, 21 S. D. 494, 113 N. W. 880 (1907); State *v.* Jackson, 221 Mo. 478, 120 S. W. 66, 133 Am. St. Rep. 477 (1909).

[0b] In such case the bank may take the note of the cashier in payment of the overdraft. If it does so he is not a volunteer but is paying his own debt, the overdraft is paid and the cashier has a right of action against the customer. Mentz's Assignee *v.* Mahoney, 150 Ky. 409, 150 S. W. 503 (1912).

[1] Eichelberger *v.* Finley, 7 Har. & J. (Md.) 381; Bank of St. Mary's *v.* Calder, 3 Strobh. (S. C.) 403; Lancaster Bank *v.* Woodward, 18 Pa. St. 357.

[2] Lancaster Bank *v.* Woodward, 18 Pa. St. 357.

with the authorized and proper officials,[0] a customer may make a legal and binding arrangement by which his overdrafts, to a certain amount named and under the circumstances agreed upon, shall be honored. The dealing is in the nature of a loan; it is placing money at his disposal and control.[0a] There may be a standing agreement, binding on the bank, for a definite period. Or there may be a mere naked permission, revocable at will.[0b] In the latter case it is not what is termed an "authority" to overdraw. The bank is under no obligation to honor the drawer's check,[0c] but may at any time refuse to do so. Neither is the drawer warranted in stating absolutely, solely on the strength of such an arrangement, that his check is "good." [1]

A mining company may legally enter into an arrangement with a bank to pay its over-checks, and where such checks are customarily signed by the president and secretary without objection, the bank may assume that they are duly authorized.[2]

A depositor notified the bank not to allow overdraft beyond a certain amount. Checks however were drawn by an authorized agent beyond the limit. *Held*, that such notice did not defeat the rights of the holders of the checks, nor the right of the bank to pay and charge the depositor.[3]

§ 359. **Overdraft may be a Fraud.** — There has been some inclination to regard the drawing of overdrafts by depositors, without warning to or understanding with the bank, as a proceeding improper, and even fraudulent, on the part of the depositor.[1] It

[0] § 358. Cope *v.* Westbay, 188 Mo. 638, 87 S. W. 504 (1905) holds that the cashier and president are the proper officers to make such loans, and if they exercise a reasonable degree of care and skill they are not liable for losses happening through errors of judgment. See also, Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228 (1911).

[0a] People's National Bank *v.* Rhoades, 28 Del. 65, 90 Atl. 409 (1913); Sagerton Hardware etc. Co. *v.* Gamer Co., Tex. Civ. App., 166 S. W. 428 (1914); Vandagrift *v.* Masonic Home, 242 Mo. 138, 145 S. W. 448 (1911).

[0b] Cope *v.* Westbay, 188 Mo. 638, 87 S. W. 504 (1905).

[0c] If it does honor the check it cannot subsequently recover from him who obtains the money. Vandagrift *v.* Masonic Home, 242 Mo. 138, 145 S. W. 448 (1911).

[1] Ballard *v.* Fuller, 32 Barb. (N. Y.) 68; Industrial Trust, etc. Co. *v.* Weakley, 103 Ala. 465, 15 So. 854 (1893); Springfield Marine Bank *v.* Mitchell, 48 Ill. App. 486.

[2] Mining Company *v.* Anglo-California Bank, 104 U. S. 192, 26 L. ed. 707 (November, 1887).

[3] Bremer County Bank *v.* Mores, 73 Iowa 289, 34 N. W. 863.

[1] § 359. Peterson *v.* Union National Bank, 52 Pa. St. 206; True *v.* Thomas, 16 Me. 36.

has been well said that a bank must often be obliged to put some reasonable amount of confidence in a depositor. And what confidence is more reasonable than that his drafts are drawn *bona fide* against his deposits, unless the bank has been notified in some manner to expect the contrary. Such a rule would probably be regarded as severe by the business community. But it has been said, *obiter*, by the Supreme Court of the United States, discussing the difference between a bill of exchange and a check, that the drawing of a check, payable instantly, by a drawer who has no funds, is a fraud.[2] This is hardly a stronger case than the overdrawing by a drawer who is known to have funds, which the bank, relying upon him, may suppose to be sufficient, and so be carelessly misled into an erroneous payment.[3]

It is clearly not the drawing, but the issuing, that may be fraudulent. And it seems very doubtful whether the Supreme Court had any thought of saying that drawing a check with no funds or insufficient funds, can be a fraud on *the bank*. There are in the bank full means of information; it has no right to rely on the representation of the drawer as to a fact concerning which it has even superior opportunities of knowledge. The bank must be held to have notice of what its books show, and no one has a right to rely on the representation of another, the falsity of which is known, and if the truth or falsity of the statements might have been tested by ordinary vigilance and attention, it is the bank's own folly if it neglects to do so.[4]

But a check-holder has not equal means of information; he has a right to suppose that a check is drawn against funds (for that is the presumption of law) unless otherwise informed at the time he accepts it, and it has therefore been held in England that if a sale of goods be made for ready money, and the buyer gives his check to the seller, knowing that he has not funds in the bank sufficient to meet it, he thereby does what is equivalent to a false representation of a material fact. This will vitiate the sale, and entitle the seller to rescind the contract. The rule is asserted with considerable rigor, for it is declared to be applicable even though the drawer, at the time of giving the check not drawn against actual funds in the bank to his credit, nevertheless had

[2] Merchants' Bank *v.* State Bank, 10 Wall. 604, 647, 19 L. ed. 1008.
[3] Peterson *v.* Union National Bank, 52 Pa. St. 206.
[4] Moore *v.* Turbeville, 2 Bibb (Ky.) 602; Saunders *v.* Hatterman, 2 Ired. (N. C.) 32; Farrar *v.* Alston, 1 Dev. (N. C.) 69.

reasonable cause to suppose that it would be paid.[5] The fraudulent character of the transaction in this case is only in its aspect towards the seller. Whether or not there is any fraudulent aspect as towards the bank is quite a different question.

There is never fraud upon one merely by his reliance on what he had no right to rely on. The bank has even better means of information as to the state of the drawer's deposit than the drawer has himself, since he may not know what checks have been presented nor collections made for him. It seems clear, therefore, that the bank has no right to regard a check as an affirmation of funds in respect to itself, though it is clearly such an affirmation as to an innocent holder. The case of Peterson *v.* Union National Bank clearly decides that drawing a check in the absence of funds is a fraud *on the bank* as well as on the holder, but it seems manifest that the decision on the facts required no such broad statement. The drawer and holder both knew there were no funds. The bank did not pay the check, but credited the holder and charged the drawer. The drawer had absconded before the check was presented, and the holder knew this fact. Now, although a check does not seem to us an affirmation *to the bank of funds in the bank at the time of presenting,* it seems equally clear that it *is* an affirmation to the bank that, if there are no funds, or insufficient funds, and the banker honors the check, the drawer will reimburse the bank; and if one draws a check, or presents it, knowing that there are no funds, that the remedy over of the bank against the drawer is worthless, the fraud is very clear. Such was the case sometimes cited for the very different doctrine that drawing a check without funds is a fraud on the bank.

The case of True *v.* Thomas decided that, when the drawer has no reasonable expectation that his check will be honored, the drawing and issuing is so far a fraud on the holder that he is relieved of the duty of demand and notice so far as the drawer himself is concerned, and may bring suit against him at once. The question of fraud on the bank was not raised in that case.

§ 360. **Bank may recover Overdraft from the Drawer.** — A bank can recover the amount of an overdraft from the drawer,[1]

[5] Loughnan *v.* Barry, 6 Ir. R. C. L. 457.

[1] § 360. Franklin Bank *v.* Byram, 39 Me. 489; Langlois *v.* Gragnon, 123 La. 453, 49 So. 18 (1909).

It is no defence that the bank promised to hold the money deposited by another as a cash item until it should be determined to whom the money belonged, since such an agreement could not create a lien on the fund nor

or from one who has received it with knowledge of a fraudulent overdrawing and without consideration;[2] and if money has been by overdraft fraudulently obtained and deposited elsewhere, it can be followed and claimed.[3]

The view noticed above — that it is wrongful in the depositor to overdraw — leads to the conclusion that the bank may, if it chooses, sue him in tort to recover the amount which it has paid on his overdraft. There is no doubt that it may sue him in *indebitatus assumpsit* for money paid to his use, the promise to pay being implied.[3a] A suit brought in this shape, however, operates as a waiver of the tort, and in it the depositor may avail himself of all his general rights of set-off.[4]

It is presumed that a deposit made subsequent to an overdraft is received toward the payment of such overdraft.[5]

No interest is allowed on the overdraft except by agreement.[6]

In an action on an overdraft the bank is entitled to have the whole account go to the jury, together with all vouchers sustaining it, as checks, drafts, and notes. The bank-book is also evidence as showing a settlement.[7]

deprive the depositor of his right to withdraw it. Jefferson Savings Bank *v.* Irving, 145 Iowa 48, 123 N. W. 937 (1909).

When a note was taken from a customer in the usual course of business and without knowledge that the overdraft was given for the purpose of paying a debt of the president of the bank to the customer, the debt is that of the customer and it may be collected from him even though the president, who was ultimately liable to the bank for its payment, promised the customer to pay it. Culpeper National Bank *v.* Walter, 114 Va. 522, 77 S. E. 484 (1913).

There can be no recovery from the principal if the overdraft was by an agent who had no authority to draw. Merchants' National Bank *v.* Nichols, 223 Ill. 41, 79 N. E. 38, 7 L. R. A. (N. S.) 752 (1906), affirming 123 Ill. App. 430 (1905).

[2] Mechanics' Bank *v.* Levy, 3 Paige (N. Y.) 606.

[3] Tradesman's Bank *v.* Merritt, 1 Paige (N. Y.) 302.

[3a] Thomas *v.* International Bank, 46 Ill. App. 461. See Hennessy Bros. *v.* Memphis National Bank, 129 Fed. 557 (1904); Earle *v.* Munce, 133 Fed. 1008 (1904).

[4] Bank of the United States *v.* Macalester, 9 Pa. St. 475.

[5] Nichols *v.* State, 46 Neb. 715, 65 N. W. 774 (1894). See First National Bank *v.* City National Bank, 102 Mo. App. 357, 76 S. W. 489 (1903); Van Buren County Sav. Bank *v.* Sterling Woolen Mills, 125 Iowa 645, 101 N. W. 477 (1904).

[6] Owens *v.* Stapp, 32 Ill. App. 653; Chicago, etc. Ry. Co. *v.* Ayers, 39 Ill. App. 607.

[7] Jack *v.* Moyer, 187 Pa. St. 87, 40 Atl. 1013 (1898).

But the books of account containing certain symbols are, in the absence of explanatory evidence, insufficient to establish an overdraft. Walker Bros. *v.* Skliris, 34 Utah 353, 98 Pac. 114 (1908).

CHAPTER XXVII

CHECKS IN GENERAL

Definition, Nature, Essentials, Kinds.

DEFINITION.

A check is an unconditional order on a bank or banker to pay a specified sum of money to a person named, or order, or to bearer on demand.

§ 373. A bill of exchange may be on demand or not, on a banker or not; a check is an instrument *combining* these two attributes, from which the law presumes that it is drawn against funds actually deposited. It may be more philosophic to treat bills as the genus and checks a species, but it will conduce to clearness to use the words exclusively, which we shall do.

CONTRAST WITH BILLS.

§§ 378–380.

Checks	*Bills*
1. Never have grace.	May or may not.
2. Must be drawn upon a bank.	May or may not be so drawn.
3. Holder may sue drawee before acceptance. (?)	Holder cannot sue drawee on a bill before its acceptance.
4. Drawer not discharged by laches in presentment, except so far as actually damaged thereby.	Drawer absolutely discharged by such laches.
5. Drawer must check against funds, or he is guilty of fraud.	Drawer need not have funds in drawee's hands.
6. Holder cannot demand acceptance, but only payment.	A bill is of right presentable for acceptance.
7. Payee of a check does not gain any time by giving it to a bank to collect.	Payee of a bill gains one day by so doing.
8. Death of drawer is held to revoke. (?)	Death of drawer does not affect the duties of the other parties; the drawee should accept just the same.

An Instrument (I.) drawn upon a Banker, and payable at a
§ 381. future day certain, is the subject of much conflict. The
§§ 382–386. better opinion is, that it has grace. It is certainly a very different instrument from a post-dated check, which, after the arrival of its date, is the same as an ordinary check, and payable at any time within reasonable limits, while I. is payable upon one fixed day. Whether I. should be considered presentable for acceptance like a bill before its maturity, or unpresentable like a post-dated check, may be open to question, though there seems to be no reason as yet given sufficient for considering I. anything other than a bill of exchange upon a banker, except in those cases where usage controls.
§ 367 *b*. When the usages of business men are not sufficiently clear to guide decision in such matters, simplicity and consistency in the law should be regarded, and in this case they place I. on the list of bills, and give it grace.

§ 363. Description and Elements of a Check.
(*a*) Indorsement.
(*b*) Form of check so unusual as to be suspicious, bank should have time for inquiry.
(*c*) Distinction between refusal to pay and request for delay.
§ 364. Essentials.
§ 365. Signature. §§ 430, 432 *et seq.*
(*a*) Representative additions, agent, etc., whose check.
(*b*) When the check discloses the name of the principal.
(*c*) Parol evidence admissible to show who is bound.
§ 366. Sum certain, "£", "$", written sum controls, etc.
§ 367. Address
To cashier.
(*a*) Must be to a bank or banker still doing business. See § 4.
(*b*) Writing controls.
(*c*) Parol admissible to show who is the drawee.
§ 368. Date.
§ 369. On demand.
§ 370. Payee.
(*a*) Fictitious.
§ 371. Words of Ordering.
§ 372. Surplusage.
§ 373. Presumptively drawn against a deposit.
§ 374. Negotiability. Missouri statute, etc.
§ 375. Instrument drawn on bank in another State still a check.
§ 376. Instruments in form of checks, but not so really, because the bank was closed.
§ 377. Checks as Bills of Exchange. Days of grace.
§ 378. United States Supreme Court summary of the likeness and difference between checks and bills.
§ 379. C. J. Shaw's opinion.
§ 380. Grant's summary.
§ 381. Instruments payable at a Day Certain.
§ 382 *a*. The best view gives grace, except where usage is to the contrary.
§ 383. New York, Georgia, Missouri, Oregon.
Ohio and California hold such usage bad; probably very weak usage was in evidence.

§ 381 *b*. § 384. Story, Sharswood in Pennsylvania, and the Rhode Island
§ 385. courts hold such instrument a check, and payable without grace.
§ 386. Discussion of the question.
§ 387. Evidence of usage should be received on this subject.

§ 388. MEMORANDUM CHECKS.
As to the bank, they are the same as any other check.
As to the drawer, they are like promissory notes, and suit may be brought against him without previous presentment.
Parol not admissible to show that an ordinary check was really a "mem."

§ 389. ANTE-DATED AND POST-DATED CHECKS.
(*a*) Bank pays before date at its own risk.
(*c*) Post-dated check cannot be presented for acceptance before its date.
(*d*) Authority to an agent to draw "checks" or to draw "bills" does not give power to draw post-dated checks in his principal's name.

§ 390. ISSUE.
Checks take effect from their issue, or, if this is conditional, then as to those with notice, from the fulfilment of the condition.
A check is issued when it is in the hands of one who may demand payment.
So far as concerns the bank, it is issued even in the hands of a thief, if the bank pays it *bona fide* without notice.
Conditional delivery may be shown by parol, as between the original parties or those having notice.

INDORSEMENT OF CHECKS.

§ 391. The effect of indorsement depends on the actual intent as to those having notice of such intent, and on the presumptions arising from the course of business as to others in cases where the actual intent differs from that presumed, as where A. indorses in blank for collection purposes. As to the bank knowing the purpose, A. is not bound as an indorser, but as to a subsequent holder for value without notice A. is bound.
An indorsement is often a mere receipt.
A check payable *to A. or bearer* may be indorsed, and if it is done *animo indorsandi*, A. will be bound.

§ 392. Indorsement by a lunatic not under guardianship held to pass no rights to a *bona fide* holder without notice. *Quære* as to the justice of this.

§ 393. CHECKS PAYABLE TO BEARER.
Pass by delivery.
Prima facie the holder is the owner.
May be indorsed, but the intent to become liable must appear or be shown; usually such indorsement is only a receipt.

§ 394. MONEY GIVEN TO THE DRAWER OF A WORTHLESS CHECK.

§ 395. TRANSFER OF CHECK BY MAIL.

§ 395 A. LOST CHECKS. § 633, C. 6.
True owner may recover from drawer, unless the check has come to a *bona fide* holder, and equity will compel the drawer to give a new check on proper indemnity being given him.

If a lost check is paid on a forged indorsement, the true owner may sue the bank but not the drawer.
§ 395 B. Conversion of Check.

§ 363. **Description and Elements of a Check.**[1] — A check is the instrument by which, customarily, a depositor seeks to withdraw his funds, or any part thereof, from the bank. It is a draft or order on the bank requiring it to pay a sum named. It may be made payable "to bearer", or "to A. or bearer", or "to A. or order", or "to the order of A." In the two latter forms it must be paid to A. in person, or to one deriving title from him through his indorsement. It is customary to indorse even when the payee makes the presentment and demand, the indorsement then having the effect of a receipt.

Indorsement

(*a*) The rules governing indorsement in cases of bills of exchange, promissory notes, and other business paper made payable to order, govern checks also. Thus a check may be indorsed generally, or in blank, or to the order of B., who again may indorse generally, or in blank, or to the order of C. Any *bona fide* holder of the check indorsed in blank may fill in a special direction above the indorsement, making it payable to himself or order; and in suing thereon, though he has not written in such direction, he may declare upon it as indorsed to himself, and will sufficiently support his declaration by showing that it was indorsed in blank, and that he is the holder for value, and in due course of business.

Essentials and Mere Formalities

If a bank refuses, without sufficient excuse, to pay a check of its depositor, it is liable to him (as will be seen hereafter) in substantial damages. It is therefore of the first importance that it should be clearly understood by the paying officers of banks what are essential requisites going to the validity of a check, and

[1] § 363. In using this chapter it should be borne in mind that it does not profess to treat exhaustively the entire subject of checks considered as a species of commercial paper. To do so would be to trespass more largely upon the domain of works on Promissory Notes, Bills, etc., than our space permits. It is of the law of checks so far as banks are parties to them, and owe duties, assume obligations, or enjoy rights in respect to them and to transactions into which they enter, that we design to treat. Beyond these limits this chapter does not pretend to state the law or cite authorities.

what are merely customary formalities which may yet be legally dispensed with. For if the check be lacking in any of the former class of characteristics, the bank is not only justified in refusing to pay it, but if it does pay it and there turns out to have been anything wrong about it, rendering the payment improper, the bank must bear the loss, and restore to the drawer's credit the amount paid. But, upon the other hand, though some of the latter class of characteristics may be wanting, yet the bank is not thereby excused from its obligation to pay; for the order being good at law, though in an unusual form, is competent to draw the money of the depositor. If the bank refuses to pay upon such an order, it must still, in strict law, be held to answer in damages. Clearly this is the logical sequence of the reasoning, and yet, though there is now no judicial authority for saying so, it seems highly probable that in cases where this rule would operate with excessive and unreasonable severity upon the bank it may be relaxed. There is no question but that a bank is entitled to exercise great care and caution to avoid being imposed upon and robbed by fraudulent and irregular orders. There is no question that it ought to have the right to demand of its depositors reasonable assistance, and a conformity to some moderate degree of consistency of conduct in drawing their orders, in order to render this difficult task of the bank at least a practicable possibility. It cannot be said, that, because a depositor ordinarily uses a certain form of blank check, therefore the occasional use of a check of a different form would authorize the bank in rejecting it, or in suspending payment till it could satisfy itself of the authenticity of the instrument. Such deviations from routine continually occur, and are to be expected. But if the order be couched in any very peculiar and unwonted shape, and bear upon its face such marks of peculiarity as naturally to cast upon it a high degree of suspicion in the minds of the bank officers, it seems only just that they should have time to assure themselves of its regularity.

If Suspicious, Bank should Inquire

(*b*) The depositor, having by his own eccentricity given sufficient cause for the suspicion, should not be suffered to avail himself of his own improper act to recover damages from the bank, or to put it to the vexation and expense of a lawsuit. This rule certainly seems perfectly accordant with equity, and not discordant

with law. At worst, it cannot be doubted that the law could limit the amount recoverable to nominal damages. A very strong case, however, ought to be made out by the bank in order to give it the privilege of availing itself of such a rule to its full extent. For a bank is held to know its customer's handwriting, and any order in his handwriting, having the legal requisites, is a defence to the bank if it pays thereon. So that the peculiarity in an instrument of this description ought to be considerable in order to make out a satisfactory case for temporary refusal. But any noteworthy peculiarity might, perhaps, be properly admitted in evidence in a suit at law by way only of mitigation of damages, if the bank should show, as a fact, that it was exclusively by reason of this characteristic, though the same did not constitute a legal defence, and not from any other default on its own part, that it refused to make the payment. For clearly a bank has a right to demand some duties from its customers in such an important matter as that of protection from fraud in a business where frauds of a peculiarly artful and ingenious nature are continually in the course of perpetration.

Distinction between Refusal and Delay

(*c*) Further, distinctions may properly be drawn between an absolute refusal to pay, and a demand for a reasonable delay, sufficient only to enable the bank to satisfy itself of the correctness of the instrument presented. The latter may often be proper when the former could not be considered so.

§ 364. **Essentials.** — At common law no precise form is indispensable to the validity of a check, though there are some few elements which are essential, and which must be present to secure its legal sufficiency. In England the statutes define certain requisites. In this country no such enactments have yet been passed. They are, however, the less missed, because adjudicated cases have pretty thoroughly covered the ground.

§ 365. **Signature.** — In the first place, the signature of the drawer is necessary.[1] But it is not indispensable that this signature should appear in the ordinary form at the foot of the check.

[1] § 365. Taylor *v.* Dobbins, 1 Strange 399; Saunderson *v.* Jackson, 2 B. & P. 238; Grant on Bankers and Banking.

It is not necessary that the body of the check be in the handwriting of the drawer. First State Bank *v.* Vogeli, 78 Kan. 264, 96 Pac. 490, 19 L. R. A. (N. S.) 402 (1908).

It may be embodied in the instrument, as, for example, "I, A. B., direct", or "A. B. requests." If it be thus written in an order, otherwise sufficient and in the handwriting of the drawer, it is enough. But the handwriting of the drawer is the safeguard of the bank in making its payment;[1a] so, though the instrument be not under seal, and the depositor may give a simple parol authority to another to sign his name, which if it could be shown by the bank would justify its payment on the order so signed, yet this signature does not render it incumbent on the bank to pay. The signature in the handwriting of the drawer, or by his attorney, whose power has been duly notified to the bank, is an element which the bank may, and for its own safety ought to, insist upon.

Representative Additions. Whose Check

(*a*) Annexing "Agent", "Trustee", "Treasurer", etc., to a signature, does not of itself notify parties that the signer acts only as a representative, when he does not disclose his principal. It is mere *descriptio personæ*. But the addition expresses the fact, and if he has been in the habit of signing in that way in dealing with a particular party who recognizes him in his representative character, "it would be contrary to justice and truth to construe the document thus made as his personal obligation, contrary to the intent of the parties."[2]

In this case a personal recovery was sought on a check signed "E. P. A., Secretary", and "W. S. W., Vice Prest."; and Judge Bradley said that such signatures were very unusual in individual transactions, and pointed so clearly to an official origin that it might be doubted if any holder could claim ignorance of the real character of the check; but in this case it was unnecessary to decide that point, as the holder actually knew the origin of the check, and "the plea that the name of the principal was not disclosed on the face of the paper cannot be made by him, for he knew all about it."[2]

(*b*) When the check discloses the name of the corporation principal, and is signed with an official addition, it is usually held

[1a] It is negligence *per se* for the bank to pay an unsigned check and it is liable to the depositor for so doing. Kenneth Ins. Co. *v.* National Bank, 96 Mo. App. 125, 70 S. W. 173 (1902).

[2] Metcalf *v.* Williams, 104 U. S. 93, 26 L. ed. 665; Shelden Canal Co. *v.* Miller, 40 Tex. Civ. App. 460, 90 S. W. 206 (1905); State *v.* Jahraus, 117 La. 286, 41 So. 575, 116 Am. St. Rep. 208 (1906).

to be a corporate check, as where "Ætna Mills" was printed in the margin and the signing was "J. D. F., Treas." [3] So where "Office of Portage Lake Manftg. Co." was printed at the top of bills, and they were signed "I. R. J., Agent"; [4] and where "Pompton Iron Works" was in the margin, and the draft was signed "W. B., Agt.;" [5] and where the draft said, "Charge the same to Swanzey Paper Co., J. H., Agt." [6]

Where a check was signed by three directors individually, their official character nowhere appearing, and also by the secretary with his addition "Secretary", and the name of the principal was not disclosed, it was held not to be a corporate check.[7]

(*c*) Where it is doubtful on the face of a check whether it is intended as an individual obligation or not, parol evidence is admissible to show who was intended to be bound; as where the signature was "J. K., Prest. Eliztn. & S. R. R. Co." [8]

§ 366. **For a Sum certain.** — The sum to be paid must be set forth with that degree of precision which will enable the bank to know with certainty what it is. It must be in terms of the national money of account, and not of foreign money. A check drawn on one of our banks by a depositor living here and expressed in sovereigns or in francs, would properly be refused payment.[1] But familiar and unmistakable abbreviations may be used. Thus in England the marks "£. *s.* *d.*", without more, have been held sufficiently to signify pounds, shillings, and pence.[2] In our own country, it has been substantially held that the sign "$" intends "dollars", although the word itself nowhere appears in any other form throughout the instrument.[3] One case has gone much farther even than this, — it may in fact prove rather dangerously far, when it is considered how easily a dot may slip in where it is not intended, or where a comma, which signifies a very different matter, may have been meant to be placed. An order was drawn simply for "37.89", in figures, without even the mark $, and the court said that it would intend therefrom that these numbers were

[3] Carpenter *v.* Farnsworth, 106 Mass. 561.
[4] Slawson *v.* Loring, 5 Allen (Mass.) 343.
[5] Fuller *v.* Hooper, 3 Gray (Mass.) 334.
[6] Tripp *v.* Swanzey Paper Co., 13 Pick. (Mass.) 291. See also Bank of British North America *v.* Hooper, 5 Pick. (Mass.) 567.
[7] Serrel *v.* Derbyshire R. R. Co., 19 L. J. C. P. 377.
[8] Lazarus *v.* Shearer, 2 Ala. 718; Keen *v.* Davis, 21 N. J. L., 683.
[1] § 366. Rastell *v.* Draper, Yelv. 80; Moore, 775; Cro. Jac. 88; Grant on Bankers and Banking, 16, and note.
[2] Kearney *v.* King, 2 Barn. & Ald. 301. [3] Corgan *v.* Frew, 39 Ill. 31.

used as whole numbers and as decimals, to express United States currency.[4] But though a court may have been willing, in a certain case, to prefer this interpretation to the necessity of otherwise holding an instrument void for intelligibility, it hardly follows that a bank might not be held fully justified in declining to pay a draft so indistinctly expressed on the ground of an uncertainty so great that it could not surely know what its customer's order really was. This might well be adduced as an example of one of those cases, where, even if the court should still hold the instrument sufficient to have drawn payment from the bank, yet the customer's carelessness must preclude him from recovering damages from the bank for refusing to pay.

The written sum controls that in figures.[5] On the margin of a check was " 2136.00 " while in the body were the words, " Twenty-one and thirty-six in exchange dollars "; *held*, that the words contradicted and controlled the figures.[6]

§ 367. **Address.** — It has been held in England, and it is undoubtedly law also in the United States, that a check must be addressed. Ordinarily our bank checks, in the common forms, bear at the top in large type the name of the bank on which they are drawn, and usually, either before this name or in the lower left-hand corner, also the words, "To the cashier of ", or "To the cashier." Whether or not these words, " To the cashier ", are indispensable to a perfect check, has never been decided; it may be supposed that they are not. No person or institution not addressed in a check or order is called upon to cash it, or could be protected in erroneously doing so. A payment so made is simply a gratuitous payment, which the payer can recover from no person.[1]

(*a*) A check must be drawn upon a banker,[2] and on a bank that is not closed.[3]

(*b*) Where a printed form upon the " First National Bank of Milwaukee " was used by crossing the words " First National " and writing " O. M. Tyler " over them in pencil, it was held that the maxim *Falsa demonstratio non nocet* applied, and the drawee's

[4] Northrop *v.* Sanborn, 22 Vt. 433. [5] Smith *v.* Smith, 1 R. I. 398.

[6] National Bank *v.* Second National Bank of Lafayette, 69 Ind. 479 (1880).

[1] § 367. Grant on Bankers and Banking.

[2] Roberts *v.* Austin, 26 Iowa 315; Planters' Bank *v.* Keesee, 7 Heisk. (Tenn.) 200; Espy *v.* Bank of Cincinnati, 18 Wall. 620, 21 L. ed. 947.

[3] Harmanson *v.* Bain, 1 Hughes 188. A draft on a bank in liquidation is merely an assignment of a chose in action, or evidence of it.

name was sufficiently certain, although the words "Bank of Milwaukee" remained uncrossed.[4]

That the instrument is drawn upon a bank or banker is not of itself enough to distinguish it, since a bill of exchange may be addressed to a banker.[5] If the addressee is really a banker, this is sufficient to make the instrument a check, though his character does not appear in the paper,[6] except as against a holder without notice.

Parol

(*c*) A check drawn on "A. B., Bank of Milwaukee", there being no such person or bank, was held to be an order on A. B., and that parol was admissible to explain the matter and show who was the addressee.[7]

A check dated at "Lafayette, Ind.," and drawn on the "First National Bank", was presumed to be a check on the First National Bank of Lafayette, and parol was admissible to show that there was such a bank.[8]

§ 368. **Date.** — A check must be dated. It may be dated either on, before, or after the day it is issued. But it would seem that if a check is not dated at all, and contains no statement of a date when it is to be paid, it is never payable. For a check is payable either on the day of its date, or else on some other day specifically designated in it. So, if it is not dated at all, and if no designation occurs, expressed in the body, which might perhaps operate to supply the deficiency of a formal dating, it is reasonable to say that it can never become due, and payment can never be demanded. If this rule, which is not directly asserted in any adjudication, goes all too far, it is nevertheless utterly impossible to doubt that a bank would be fully justified in refusing to pay a check showing an unexplained deficiency of so important a character.[9] It has been said that a check may be dated on Sunday, though it cannot be payable on that day.[1]

[4] Cork *v.* Bacon, 45 Wis. 192.

[5] Georgia National Bank *v.* Henderson, 46 Ga. 495.

[6] Planters' Bank *v.* Keesee, 7 Heisk. (Tenn.) 200.

[7] Cork *v.* Bacon, 45 Wis. 192.

[8] Culver *v.* Marks, 122 Ind. 554, 23 N. E. 1086.

[9] § 368. In Gordon *v.* Lansing State Sav. Bank, 133 Mich. 143, 94 N. W. 741 (1903) a judge, dissenting upon another point, says that the weight of authority is to the effect that the omission of the date does not invalidate the check.

[1] Begbie *v.* Levi, 1 C. & J. 180. See also Grant on Bankers and Banking. See below, tit. "Post-dated Checks."

§ 369. **On Demand.** — The essential characteristic of a check is that it shall be instantly payable on demand.[1]

A draft on a bank payable at a future time is not a check, but a bill.[2]

§ 370. **Payee must be named.** — Where no payee is indicated, the instrument is not a check.[1]

Fictitious Payee

(*a*) It may be that a check is neither made payable to bearer nor to the order of any person. That is, it may be made payable to the order of A. B., being, or intended and supposed to be, a fictitious name. In such case no indorsement is required, for the check is regarded as equivalent to a check made payable to bearer.[2] In fact, a check drawn to the order of a mere name, representing no actual individual, is not drawn to the order of any *person*, but to the order of *mere words*. It is, therefore, incapable of indorsement by a payee, and is of like character with the checks forthwith to be mentioned in this connection.

So checks, being filled in on printed blanks and intended also to serve as memoranda of the purpose for which they are drawn, are often made payable to words in themselves meaningless in the connection in which they are used; *e.g.* "to the order of bills payable", or of "rent", or "of 1685", or any other words not signifying either existing persons or a corpration. In all such cases the checks are regarded at law as if they had been made payable simply to bearer, and they have all the legal characteristics of checks actually so made.[3]

[1] § 369. Merchants' National Bank *v.* Ritzinger, 118 Ill. 486, 8 N. E. 834.

But the depositor may agree with the bank that payment shall be deferred for a reasonable time to enable the bank to ascertain whether it has on hand sufficient funds of the drawer of the check with which to pay it. And if the parties knew of a custom to that effect they are bound thereby. Pollack *v.* National Bank, 168 Mo. App. 368, 151 S. W. 774 (1912).

[2] Harrison *v.* Nicollet Bank, 41 Minn. 488, 43 N. W. 336.

[1] § 370. McIntosh *v.* Lytle, 26 Minn. 336, 3 N. W. 983; Daniel Neg. Inst. § 1571. See Gordon *v.* Lansing State Sav. Bank, 733 Mich. 143, 94 N. W. 741 (1903).

[2] Coggill *v.* American Exchange Bank, 1 Comst. (N. Y.) 113; Plets *v.* Johnson, 3 Hill (N. Y.) 112; Foster *v.* Shattuck, 2 N. H. 466; Vere *v.* Lewis, 3 Term 182; Minet *v.* Gibson, *id.*, 481, and s. c. 1 H. Bl. 569; Collis *v.* Emett, 1 H. Bl. 313.

[3] Story on Promissory Notes, § 488; Willets *v.* Phœnix Bank, 2 Duer

But if a line is drawn through the space provided for the name of the payee, it is not payable to bearer or to an impersonal payee, and is void.[3a]

Equitable ownership may be shown to be in a person other than the payee named in the check.[4]

§ 371. **Words of Ordering.** — Finally, it seems almost superfluous to remark, in closing the list of indispensable requisites, that there must, of course, be sufficient words of ordering or requesting to signify the intent of the drawer that the bank should pay the sum named in the manner named. This is elementary, and has never required the support of a judicial decision.

§ 372. **Surplusage.** — Provided the check combines all these characteristics, it is not the less a check, nor is it invalidated as an order on the bank, because it contains other immaterial matter; such, for example, as the statement that it is given for value received, or a mention of the consideration.[1]

Where a check contained the words "original" and "second unpaid", it was urged that these expressions made its payment conditional, and that it was not a check. But the court said:[2] "The practice of making more than one copy of an instrument ordering or requesting the payment of money, we concede, is generally confined to foreign bills of exchange; but there is nothing, in our opinion, in the purpose or effect of that practice, which should render it inapplicable, under all circumstances, to checks. The purpose is to guard against loss or question in case of miscarriage, the chances of the bill reaching, in due season, the party to whom it is transmitted, being increased by the number of copies. But this does not render the instrument a condition alone, in any sense. The whole of the set constitutes, in law, but one bill, and therefore payment or cancelling of either of the set is a discharge."

An instrument is not less a check because it orders payment "on account of A."[3]

(N. Y.) 121; Mechanics' Bank *v.* Straiton, 3 Keyes (N. Y.) 365; Vere *v.* Lewis, 3 Term 182; Minet *v.* Gibson, *id.*, 481; 1 H. Bl. 569.

[3a] Gordon *v.* Lansing State Sav. Bank, 133 Mich. 143, 94 N. W. 741 (1903).

[4] Mackey *v.* Craig, 144 Ind. 203, 43 N. E. 6.

[1] § 372. Wells *v.* Brigham, 6 Cush. (Mass.) 6.

[2] Merchants' National Bank *v.* Ritzinger, 118 Ill. 487, 8 N. E. 834.

[3] 109 Ill. 479.

§ 373. **Presumptively drawn against a Deposit.** — A check purports to be drawn against a deposit. It may not really be drawn against funds, but if it purports to be it is a check.[1]

A check is presumptively drawn on a previous deposit,[1a] and is an absolute appropriation of it to the amount of the check.[2]

The giving of a post-dated check is not a representation that the maker has the funds then in the bank, but it is a representation that it is a solid order for the amount named, and that the existing state of facts is such that in ordinary course the check will be met.[3]

§ 374. **Negotiability.** — In Missouri by statute the words "for value received" are essential to negotiability.[1]

An instrument payable "in bills bank", or "in currency", has been held not to be negotiable.[2] But the better opinion is that the words "payable in currency", or "in current funds", do not impair the negotiability of a bank check; such terms mean money.[3]

An order qualified on its face by the words, "the bank-book of the depositor must accompany this order", is not negotiable.[4] And so where in the upper margin of the order is printed, "Return notice ticket with this order", and in the lower margin, "Deposit must be at the bank before money can be paid."[5]

The negotiable character of a check raises a *prima facie* presumption that it is founded on a valuable consideration.[6]

§ 375. **Payable in another State.** — The fact that the instrument is payable in another State than the one in which it is drawn, does not change its character as a check.[1]

[1] § 373. Champion *v.* Gordon, 70 Pa. St. 476; White *v.* Ambler, 8 N. Y. 170; McKnight *v.* Bank of Acadia, 114 La. 289, 38 So. 172 (1905).

[1a] McClain *v.* Lowther, 35 W. Va. 297, 13 S. E. 1003 (1891); Industrial Trust, Title, & Savings Co. *v.* Weakley, 103 Ala. 458, 15 So. 854 (1893); Farmers' Bank *v.* Johnson, 134 Ga. 486, 68 S. E. 85, 137 Am. St. Rep. 242, 30 L. R. A. (N. S.) 697, n. (1910).

[2] Stevens *v.* Park, 73 Ill. 387; Lester *v.* Given, 8 Bush (Ky.) 357.

[3] Barton *v.* People, 35 Ill. App. 573.

[1] § 374. International Bank *v.* German Bank, 3 Mo. App. 362.

[2] Little *v.* Phœnix Bank, 2 Hill (N. Y.) 425; Bank of Mobile *v.* Brown, 42 Ala. 108.

[3] Bull *v.* First National Bank, 123 U. S. 105, 31 L. ed. 97, 8 Sup. Ct. 62.

[4] White *v.* Cushing, 88 Me. 339, 34 Atl. 164.

[5] Iron City National Bank *v.* McCord, 139 Pa. St. 52, 21 Atl. 143.

[6] Lamp Co. *v.* Manufacturing Co., 64 Mo. App. 115.

[1] § 375. Merchants' National Bank *v.* Ritzinger, 118 Ill. 486, 8 N. E. 834; National Bank of America *v.* Indiana Banking Co., 114 Ill. 483, 2 N. E. 401; Union National Bank *v.* Oceana County Bank, 80 Ill. 212; Planters' Bank *v.* Keesee, 7 Heisk. (Tenn.) 200; 2 Parsons, B. & N. 58, 59; Roberts *v.* Austin, 26 Iowa 315; Bowen *v.* Needles National Bank, 87 Fed. 437 (1898).

§ 376. **Instruments having the Form of Checks.** — An instrument may have in every respect the form of a check, and may yet not have this character as matter of law. An instance of this, and perhaps the only description of such instances likely to occur, is furnished by the following case. A bank, after having ceased to do business for ten years, resumed, but only for the purpose of liquidation. In this process seven years more were consumed, during which time deposits due from the bank were treated, practically, as commodities, were bought and sold in the market like bonds or stocks, were never redeemed in money by the bank, but were only sought by parties indebted to the bank in order that they might be availed of in set-off. It was held that a draft drawn against these deposits, though in form a check, yet was not so in law, inasmuch as it was not in fact payable in money, nor was it drawn on a bank properly so described; also because it was of limited negotiability. It was said to be simply evidence of an assignment of a chose in action.[1]

§ 377. **Checks as Bills of Exchange: Days of Grace.** — Checks are constantly stated to be like bills of exchange, and to be governed by the same rules; sometimes they have even been said actually to be bills of exchange.[1] Other authorities content themselves with stating that the analogy between these two instruments is very close. Much laxity and diversity of language will be found in the opinions of the courts in this respect. The judges will be found to say that a check is like a bill of exchange, except in certain characteristics, and then each judge will mention the characteristic which happens at the moment to occur to his mind as presenting a point of distinction. But the controversy seems to be little more than one of language. It makes very little difference whether it be stated that a bill of exchange and a check are substantially one and the same instrument, but that they differ, by reason of the usages of business and the manner of drawing them, in some very material points; or whether, on the other hand, it be stated that they are distinct instruments, but that they have very many and very strong points of resemblance and even of identity. The one statement is simply based on a recognition of the points of resemblance as forming a bond of union strong

[1] § 376. Harmanson *v.* Bain, 15 National Bankr. Reg. (E. Dist. Va.) 173.

[1] § 377. Rogers *v.* Durant, 140 U. S. 298, 35 L. ed. 481, 11 Sup. Ct. 754 (1891); People *v.* Kemp, 76 Mich. 410, 43 N. W. 439; First National Bank *v.* Northwestern Bank, 152 Ill. 296, 38 N. E. 739.

enough to overcome the repulsion of the points of difference. The other grows out of the view that the substantial differences are more powerful to sunder the two classes of instruments than the points of similarity are to unite them. It follows that so long as all are agreed on what are in fact the points of resemblance, and what are in fact the points of difference, this is all that is really essential in the matter.

§ 378. **United States Summary of Likeness and Difference.** — The Supreme Court of the United States, in a leading case, say: "Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper; and many of the rules of the law merchant are alike applicable to both. Each is for a specific sum payable in money. In both cases there is a drawer, a drawee, and a payee. Without acceptance no action can be maintained by the holder upon either against the drawee. The chief points of difference are that a check is always drawn on a bank or banker; no days of grace are allowed. The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default.[1] It is not due until payment is demanded, and the Statute of Limitations runs only from that time. It is by its face the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer. It is not necessary that the drawer of a bill should have funds in the hands of the drawee. A check in such a case would be a fraud." [2] Further, it is admitted without dispute that a check is "never presentable for acceptance, but only for payment"; [3] that is to say, the holder has no right to demand anything save a cash payment; he has no claim upon the bank to accept.

§ 379. **Opinion of C. J. Shaw.** — A check is an order to pay the holder a sum of money at the bank on presentment of the check and demand of the money; no previous notice is necessary; no acceptance is required or expected; it has no days of grace. It is payable on presentment, and not before. Mere notice to the bank that a party holds a check without presentment and demand will not bind the bank, and if there be funds when notice

[1] § 378. See also Keene *v.* Beard, 8 C. B. N. S. 372; Laws *v.* Rand, 3 *id.*, 442; Robinson *v.* Hawksford, 9 Q. B. 52.

[2] Merchants' Bank *v.* State Bank, 10 Wall. 604, 647, 19 L. ed. 1008, 1019. See Espy *v.* Bank of Cincinnati, 18 Wall. 604, 620, 21 L. ed. 947, 951.

[3] Morse *v.* Massachusetts National Bank, 1 Holmes (C. C.) 209.

is thus given, without presentment for payment by the holder, and in the meantime other checks of the same drawer are presented and the fund paid out upon them, the bank is not liable. Checks are not payable in the order of the priority in which they are given, but in that in which they are presented." [1]

Bank checks are in form and effect bills of exchange, not direct promises to pay, but only in case the drawee does not pay.[2]

§ 380. To our mind the differential traits decidedly preponderate; and the more correct method is to treat the check as an altogether independent and distinct instrument from the bill of exchange, admitting at the same time that in some few specific matters the resemblance between the two instruments is sufficiently strong to cause one and the same rule to cover and include them both. Mr. Grant would appear, however, to be of the contrary mind. He says, " Checks are, by recent legislation imposing a stamp duty upon them, and creating a class payable to order, nearly on the same footing as bills of exchange; and the decisions of the courts have been of late in favor of putting them on the same footing as to their general legal incidents and characteristics." [1] Yet he follows this statement with such a formidable array of the points of dissimilarity as would seem to show that it is impossible thus to unite the two instruments into a single legal entity without creating infinite confusion, inconsistency, and doubt. His list is, briefly, as follows: —

First. No days of grace are allowed upon checks.

Second. The payee of a check does not obtain any more time by employing a banker to present it; whereas the holder of a bill, by the same course, would obtain an extra day.[2]

Third. The death of a drawer of a check revokes the drawee's authority to pay; whereas the death of the drawer of a bill has no effect upon the duties of the other parties to the instrument.[3]

Fourth. A check must be drawn against funds of the drawer in the hands of the drawee; whereas there need be no funds of the drawer in the hands of the drawee of a bill.[4]

Fifth. The drawer of a bill is discharged by want of due presentment to the drawee; whereas the drawer of a check is not dis-

[1] § 379. Shaw, C. J., in Bullard *v.* Randall, 1 Gray (Mass.) 606.
[2] Foster *v.* Paulk, 41 Me. 428.
[1] § 380. Grant on Bankers and Banking, 3d ed., p. 103 *et seq.*
[2] Alexander *v.* Burchfield, 7 M. & G. 1061.
[3] Billing *v.* Devaux, 3 M. & G. 571.
[4] Keene *v.* Beard, 8 C. B. N. S. 372, 381.

charged by any length of delay in presentment, at least unless he can show actual loss or injury to himself by reason of such delay; as, for example, by the failure of the drawee in the interval.[5]

Sixth. Bills of exchange, payable on a fixed day, differ in this respect from a check, which is not due before payment is demanded.[6]

The points of resemblance between checks and bills of exchange, noted by Mr. Grant in the same connection, are as follows: —

First. That notice of non-payment of the check and non-acceptance of the bill may be dispensed with, if the drawer had no funds or no sufficient reason to expect the payment or acceptance.[7]

Second. That checks *may* be accepted (though infrequently), and may pass by delivery.[8]

Third. That the holder of a check is affected by equities and infirmities, in like manner as would be the holder of a bill.[9]

The main point of difference, upon which there is no diversity of authority, is that a check has no days of grace. It is payable immediately upon demand, on, or at any day after, the day of its date; and this equally though the words "on demand" are not expressed.[10] There can be no question of this rule; the authorities are overwhelming. But it often happens that instruments otherwise in the form of checks are yet in some way made payable at a day later than that of their issue, and sometimes later than that of their date. They may be made payable at a day later than that of their issue, but on that of their date, by being dated on a day subsequent to that of their issue, but in no other respect whatsoever differing from a check payable immediately. These are called

[5] Keene *v.* Beard, 8 C. B. N. S. 372, 381; and see *post*, title "Presentment, the Time within which it should be made and the Effect of Delay."

[6] Boehm *v.* Sterling, 7 T. R. 430; Alexander *v.* Burchfield, 7 M. & G. at p. 1067.

[7] Thomas *v.* Fenton, 5 D. & L. 28; Kemble *v.* Mills, 1 M. & G. 757; 9 Dowl. 446; Carew *v.* Duckworth, 4 L. R. Exch. 313; Robinson *v.* Hawksford, 9 Q. B. 52.

[8] Keene *v.* Beard, 8 C. B. N. S. 372, 380.

[9] Whistler *v.* Forster, 14 C. B. N. S. 248.

[10] Moyser *v.* Whitaker, 9 Barn. & Cr. 409; Sutton *v.* Toomer, 7 *id.* 416; Down *v.* Halling, 4 *id.* 330; Dixon *v.* Nuttall, 1 C. M. & R. 307; Hare *v.* Copland, 13 Irish C. L. 426; Grant on Bankers and Banking; Story on Promissory Notes, § 489; Daniel Neg. Inst. § 1572; *Ex parte* Brown, 2 Story 503; Woodruff *v.* Merchants' Bank, 25 Wend. (N. Y.) 673; Salter *v.* Burt, 20 Wend. (N. Y.) 205; Morrison *v.* Bailey, 5 Ohio St. 13; Westminster Bank *v.* Wheaton, 4 R. I. 30; Chapman *v.* White, 2 Seld. (N. Y.) 412; 3 Kern (N. Y.) 290; Harrison *v.* Nicollet Bank, 41 Minn. 488, 43 N. W. 336.

post-dated checks; they are a familiar instrument, and will be fully discussed hereafter. It suffices for our present purpose to say, that such are always payable on, or at any time after, the day of their date.

§ 381. **Instruments payable at a Day certain.** — But often an instrument, in its form substantially like a check, is made payable at a day subsequent to that both of its date and of its issue, either by naming such a date in the body of the instrument, or by making it payable so many days after date. In such cases it is often a question whether or not grace is to be allowed. But though this is the question, it does not take the form of whether or not grace is to be allowed *on such a check*, but whether or not such an instrument *is a check at all*. For if it is a *check*, that simple fact is conclusive of the fact that it is payable immediately on demand, on the day named, without grace. A check is and must be always so payable. But if it be not a check, then it will probably have the customary grace of the place where it is made payable, and will be called a bill of exchange.[1] The various cases present every variety of instrument, each diverging in a greater or less degree, and in its own peculiar manner, from the ordinary form of a bank check dated and payable on the day of its issue.

(*a*) Treating generally of an instrument dated on a certain day, and by some form of words made payable at a day certain thereafter, it is probable that between the array of opposing authorities the preponderance will be considered to lie in favor of the doctrine that such paper is not to be considered as a check, but as an inland bill of exchange, and therefore entitled to grace. We cite below the cases which sustain this view, and it will be seen that they are numerous, and that some of them have been rendered by tribunals entitled to command great respect.[2] Of the cases cited the one carrying the most weight certainly is the New York case of Bowen *v.* Newell. This cause was litigated by the parties with great pertinacity; it is in the Reports four different times. It first appears in 5 Sanford 326, where the court held that the instru-

[1] § 381. Harker *v.* Anderson, 21 Wend. (N. Y.) 372.

[2] Morrison *v.* Bailey, 5 Ohio St. 13; Andrew *v.* Blachly, 11 *id.*, 89; Bowen *v.* Newell, 4 Seld. (N. Y.) 190, overruling the same case in 5 Sandf. (N. Y.) 326; again affirmed in same case in 3 Kern. (N. Y.) 290: Brown *v.* Lusk, 4 Yerger (Tenn.) 210; Daniels *v.* Kyle, 1 Kelly (Ga.) 304; Woodruff *v.* Merchants' Bank, 25 Wend. (N. Y.) 673; Minturn *v.* Fisher, 4 Cal. 35; Bradley *v.* Delaplaine, 5 Harr. (Del.) 305; Georgia National Bank *v.* Henderson, 46 Ga. 487.

ment, being an order upon a bank to pay on a future day certain, was a check, and not entitled to grace. The decision in 5 Duer 584 was to the same effect. But in 4 Selden 190, a contrary opinion was rendered. The court said that the decision of Judge Story in the Matter of Brown (which will be discussed hereafter) was the only authority for holding such a document to be a check, and as such not entitled to grace; that this doctrine was untenable, and that the contrary must be pronounced. The case came up once more upon a side issue, reported in 3 Kernan 290; and here the court took pains to say that their decision in 4 Selden was to the effect that by *the principles of the law merchant* the instrument was entitled to grace, and that they were still of the same mind, though now they allowed local usage to control the law merchant. The instrument in question was drawn in New York upon a bank in Connecticut, but this fact of a difference of States was not availed of as furnishing any additional reason for considering it a bill of exchange. The decision was based strictly upon the wording of the document, which called for payment on a day certain after the date. In the Pennsylvania case, Bradley *v.* Delaplaine, the words "ninety days after date" were inserted in an ordinary bank check before the words directing payment. The court said it was a bill of exchange.

(*b*) Upon the other side the authorities are few, and derive their weight chiefly from the influence which attaches itself to the opinion of one who has had so much to do with the moulding of American law as Mr. Justice Story. His opinion, delivered in the Matter of Brown,[3] is an elaborate disquisition, in which many questions concerning the law of checks are treated with much learning and clearness. He lays down very positively, in an argument of considerable length, that an instrument having the general form and characteristics of a check, save that, being drawn and dated on a certain day, it is made payable on a future day named, is payable on and after such day, immediately upon presentment, without grace. He well remarks that the parties, by using the common form of a bank check, an instrument to which the peculiarity of carrying no grace is well known to be inseparably attached, signify that they propose to execute and issue a bank check, and not any other species of business paper whatsoever; wherefore they impliedly authorize and direct the bank to treat the document as a check; that is, to pay it immediately upon

[3] 2 Story 502.

presentment and demand on any day on or after that specially named for payment. At the time of the rendition of this decision, the only contrary authority was that contained in the decision in Brown *v.* Lusk, 4 Yerger (Tenn.) 210, which Judge Story certainly could venture to overrule, and which he did not hesitate thus to dispose of. In Harker *v.* Anderson (*supra*), Judge Cowen referred to this opinion of Judge Story with respect, and evidently inclined to indorse it fully, though the facts immediately before him did not render it wholly necessary for him to do so. Speaking also of Brown *v.* Lusk, cited above, he said that the decision in that case was based upon a citation from Chitty, which upon examination proved insufficient to support the doctrine so built upon it. But the judge's general line of argument was chiefly applicable to post-dated checks, about which, as before stated, the law is well settled.

§ 382. **New York, Ohio, and California.** — It will be observed that the latest decisions tend quite uniformly to the view that all such hybrid instruments, which are ordinary checks in all save the naming of a future day for payment, but in that respect are bills of exchange, take their legal character from this last important feature, and bear grace accordingly. The influence of New York decisions upon matters of financial law is, of course, of immense weight; and these, backed by the troop of lesser authorities which have already adopted the same view, will doubtless finally suffice to settle the law for the country. The advantage of having the question definitely settled would be so great that the community will probably be well satisfied with a conclusion in either direction. The courts in New York are always anxious to carry out and legalize so far as possible what is known to be the common understanding of business men. Nowhere else is evidence of usage and custom, in business causes, so readily admitted or so much deferred to. It is a wise and wholesome habit of the courts. So in this matter of checks payable at a future day named, when the courts had held that they should bear grace, it was at once proposed to offer evidence of the usage and custom among business men not to regard such paper as entitled to any such privilege. So in the case, above discussed, of Bowen *v.* Newell,[1] evidence of the custom of the banks of Connecticut to regard such orders as payable instantly was offered. In the last decision which was rendered in the case (3 Kernan (N. Y.) 290)

[1] § 382. *Ante*, § 381.

it was said that it appeared from the findings of the lower court that the law in Connecticut gave no grace on paper of this description, that therefore of course there could be none; and that these findings of the lower court were "upon evidence derived from the best sources, and of the most unquestionable character." This admirable evidence was simply evidence of usage.

The 3 Kernan rule is both the best in sense and the latest in time, and may be regarded as conclusive of the views of the New York judiciary. But in Ohio and California an opposite rule has been laid down, and a local custom to regard such orders as checks, and so payable at once, was held bad; and evidence thereof was declared inadmissible.[2]

§ 383. **In Pennsylvania and Rhode Island**, a draft on a banker payable so many days after date,[1] or after sight,[2] has been held a check, and not entitled to grace. But in Ohio,[3] Georgia,[4] California,[5] Missouri,[6] and Oregon,[7] as well as in New York, a draft on a bank payable at a day certain is held entitled to grace, at all events unless local usage varies the rule.

§ 384. **Sharswood's View.**[1] — "The ordinary commercial form of a bill of exchange payable at a future day is at so many days' or months' notice after date or sight. An order so drawn, whether upon a banker or any other person, ought to be regarded as a bill, with all the privileges and liabilities which by the law merchant are incident to a bill. The drawer, by adopting this usual form, must be held so to intend. So if an order be drawn on a merchant or other person not a banker, with whom the drawer keeps money on deposit subject to draft, payable at a future day named, there exists no reason why the same rule should not apply. But there is a good reason why there should be a difference between an order so drawn upon a banker, which certainly must be presumed to be by a person who keeps money on deposit with such banker, subject to draft, and an order on a merchant or other person.

"If *such an order drawn upon a bank payable at a future day*

[2] Morrison *v.* Bailey, 5 Ohio St. 13; Minturn *v.* Fisher, 4 Cal. 35.

[1] § 383. Westminster Bank, 4 R. I. 30.

[2] Herring *v.* Kesee, South. Law Rev. 614, Oct., 1872.

[3] Morrison *v.* Bailey, 5 Ohio St. 13.

[4] Georgia National Bank *v.* Henderson, 46 Ga. 496.

[5] Minturn *v.* Fisher, 4 Cal. 36.

[6] Ivory *v.* Bank of the State, 36 Mo. 475. See Bradley *v.* Delaplaine, 5 Harr. (Del.) 305; Work *v.* Tatman, 2 Houst. (Del.) 304.

[7] Hawley *v.* Jette, 10 Or. 31.

[1] § 384. Sharswood, in Champion *v.* Gordon, 70 Pa. St. 474.

named in it must be considered as an inland bill of exchange and not a check, then the payee or holder has a right to present it at once for acceptance, protest it at once for non-acceptance, and sue the drawer immediately. Should it be accepted, however, the funds of the drawer in the bank would necessarily be thereby tied up until the day of payment. *All the objects of directing payment at a future day would thus be frustrated.* What the drawer undertakes is that on a day named he will have the amount of the check to his credit in the bank. In the mean time he wants the full and free use of his entire deposit. It is not denied that a post-dated check cannot be presented for acceptance. That is by implication payable on a future day. Why then is a check expressly so made payable to stand on different ground? In the case before us, an ordinarily printed form of a bank check was evidently used, and the day of presentment written in one of the blanks. This is the most convenient form, for it calls the attention of the cashier or paying teller to the fact which he would be likely to overlook if it were expressed only by the date. . . . If we determine that an order like that before us is not presentable for acceptance before maturity, we settle the question. It is a check, and not a bill of exchange."

§ 385. **Rhode Island.** — "Ninety days after date, pay to the order of James Wheaton, four hundred and fifty dollars —— cents. $450. Sinope Mills." Indorsed in blank, "James Wheaton, per B. Cozzens, Agent." The court held this a check, saying: "A check is an order drawn upon a banker, or *a person acting as a banker in England*, or in this country upon such a person or upon a bank. It was originally part of the definition of a check that it was payable on demand. It was afterwards held that it might be post-dated and still be a check. In such case it was payable immediately after date, though days had elapsed since it came to the payee's hands. Still later, it was held to be a check, though payable on a day certain after date, if drawn upon a bank or banker. The instrument in suit differs from the last in this only, that the day when it is payable is not named, but it is payable a certain number of days after date, and that the precise day of payment is to be ascertained by calculation; all the elements of such calculation being contained in the paper itself. Substantially and for all practical purposes it is the same, since the day may be made certain from the paper itself. *At this day the only distinguishing difference between a general bill of exchange and a check*

is that a check must be drawn upon a bank, or upon a banker or one acting as a banker." [1]

§ 386. **Discussion of the Grace Question.** — Story's argument seems to us very weak: the rule that a check has no grace is a result of the fact of its being payable on demand. It is a general principle of commercial law that demand paper shall not have grace, and it is not a peculiarity of a check, but belongs to all paper possessing the attribute from which this sub-attribute flows. It is not proper, then, to argue that a merchant drawing an instrument payable at a day certain must be presumed to contemplate that it will have no grace because it is on check paper. That is to argue that we must decide contrary to the recognized principles of law, because it is likely that the parties misconceived those principles. Since the law presumes knowledge of itself, it would seem more proper to say, that as it is a well-settled principle that all paper on demand has no grace, and that all paper payable at a day certain has grace, the parties must be presumed to have contracted in reference to that principle and have intended the instrument to have grace. Such would seem to us the proper reasoning as to the intent of the parties, looking at the question as though it had arisen for the first time.

When we turn to the broader aspect of the question, and ask what rule it is best to establish to secure in the greatest degree the benefits at which the law aims, we note that, other things equal, simplicity is valuable in legislation, as rendering conformity to law easier, favoring prevision, and lessening litigation; without some good reason, then, outweighing this, the rule of the law merchant previously established should be applied, and an instrument payable at a day certain should have grace, whatever color the paper may be on which it is written.

Nothing can be gained by an opposite rule but a senseless inconsistency in the law. If the drawer wishes the instrument to be payable without grace, he can accomplish the object by post-dating it. It is perfectly clear that every instrument drawn on a banker is not a check. Authority is clear that a bill may be drawn on a banker, and the character of the paper on which an instrument is drawn surely cannot determine its character in opposition to its words and their legal effect, and it is perfectly clear that if the instruments in the above cases had been drawn on ordinary white paper they would never have been considered checks.

[1] § 385. Westminster Bank, 4 R. I. 30.

But, on the other hand, because such drafts are clearly within the principle allowing grace, and are not checks (if we keep that word to designate a class of instruments payable on demand, and it does seem a pity to pour confusion into the law by loosely applying terms to new varieties, and then arguing that they must possess all the attributes connoted by those terms), it does not follow that they must necessarily possess all the other characteristics of ordinary bills of exchange. There is nothing to prevent the discovery of new species of commercial paper, any more than the discovery of new forms of animal life; and it would be just as reasonable for naturalists in case of a new species, B., intermediate in its characteristics between A. and C., to say that it must belong to A. because it is most like A., and therefore it must be deemed to have all the attributes of the members of A. already known, or for other naturalists to class it in the same way with B., as for lawyers and judges to declare that an instrument in some respects like an ordinary bill of exchange and in other respects like a check is to be considered either one or the other.

There is a reason for each attribute that has been adjudged to belong to a bill or a check: if the reason exists in the new instrument, let the attribute be attached, otherwise not. So while the paper under discussion has grace, it may very properly be held to be unlike an ordinary bill in that it is not presentable until the day named. This would satisfy all that is of force in Sharswood's opinion above, though whether it is best to introduce this addition to the law merchant when the purpose can so easily and clearly be attained by the words "without acceptance", or by post-dating, may perhaps be open to argument.

After all, the really important matter is to secure a uniform, well-settled rule, and this seems not likely soon to be obtained, though ultimately, no doubt, usage and legislation will bring the music of the States into harmony.

§ 387. **Evidence of Usage** as to the question of grace has been offered in several cases. The difficulty in admitting such testimony has been considered to lie in the fact, that it is the proper province of the court to declare what is the legal character of such documents, whether they are checks or bills of exchange. The law, it is considered, must make them imperatively either the one or the other, and according to the decision must be the equally imperative assertion as to whether or not they shall bear grace. Usage therefore has been deemed inadmissible, because its only effect,

if it should have any at all, must be to control a rule of law. A few authorities sustain this view.[1] It was certainly the view which the court of New York were inclined to take at the time of the earlier decision in Bowen *v.* Newell. No one who reads that opinion can fail to gather this conclusion from it; and it was upon the strength of this that the Ohio case was decided. But the latest authority in New York is the decision in the case of Bowen *v.* Newell as last rendered and revised, published in 3 Kernan, 290. Here the court say that the lower court have found that the law in Connecticut, where the paper was payable, gives no days of grace upon it; that this finding of the law was "upon evidence derived from the best sources, and of the most unquestionable character." By turning to the report of the cause in the lower court,[2] we find that this so emphatically excellent evidence, which was allowed so thoroughly to settle the law, was simply evidence of the usage of banks and of persons dealing with banks in Connecticut. The court escape the trouble of reconciling this view with their former contrary one by the arbitrary assertion that in 4 Selden they only held that, *by the law merchant*, the instrument was not entitled to grace. This assertion will satisfy nobody; for it is not true. But its degree of accuracy is a matter of little moment, since the last ruling, in 3 Kernan, is too clear and positive to leave any doubt as to the law in New York.

The doubt is, simply, whether or not the allowance or disallowance of grace upon a certain anomalous description of paper is a proper subject of usage. Why it should not be so, it is difficult to say. It is clear that such paper, whether it be called a check or a bill of exchange, is a materially modified form of either. It is, in fact, an independent and anomalous species of paper. When, therefore, it is considered that the entire principle which gives days of grace upon particular species of commercial paper was, in its origin, wholly a matter of the usage of bankers, there seems no reason why the same usage, if actually shown to exist, should not be properly extended to still another species of paper, of comparatively modern origin. Even if the instrument is a check, it is a peculiar alteration of the common form of checks. It is clear that the allowance of grace on business paper is a proper subject of usage, since it owes its very existence to usage. Why,

[1] § 387. Morrison *v.* Bailey, 5 Ohio St. 13; Minturn *v.* Fisher, 4 Cal. 35. See also Woodruff *v.* Merchants' Bank, 25 Wend. (N. Y.) 673; Bowen *v.* Newell, 4 Seld. (N. Y.) 190; 3 Kern. (N. Y.) 290.

then, are not checks equally a proper subject for usage, and, if so, why may not usage draw distinctions in this respect between two different descriptions or classes of checks which vary from each other in so important a trait that very many courts are unwilling to apply the common name of check to each of them, but reserve it for the more usual kind, and prefer to describe the others as bills of exchange?

§ 388. **Memorandum Checks.** — "Memorandum checks", so called, are instruments of quite common use in business circles. Their character and legal effect depend somewhat upon the parties between whom the questions concerning them arise. As between the drawer and the payee they are a species of evidence of indebtedness. They are practically intended as such, and the courts recognize them as such. They are usually given either for money borrowed, or for a debt contracted in the course of dealings. They are, in fact and in law, equivalent to the drawer's promise to pay, for value received. The holder may sue upon them as upon a promissory note,[0] and by reason of their peculiar character he is not held to present them at the bank for payment prior to bringing his suit against the maker.[1] Presentment and notice are waived.

(*a*) But as between the drawer and a person other than the payee receiving the check, though *bona fide* and for value, the facts that the abbreviation "mem." is written on its face, and that it is two and one half years old, have been declared sufficient to put such taker upon his inquiry, and to entitle the drawer to set up as against such taker all equities and defences which he could have set up as against the original payee.[2]

(*b*) But though they are thus a complete and perfect evidence of indebtedness as between these parties, as between the bank and the payee they are still ordinary checks, nothing less or more. The fact that the word "memorandum" or the abbreviation "mem." is written on a check is sufficient in law to render it a

[0] § 388. Camas Prairie State Bank *v.* Newman, 15 Idaho 719, 99 Pac. 833, 128 Am. St. Rep. 81, n., 21 L. R. A. (N. S.) 703, n. (1909). If the drawee is a party to an unlawful transaction for which the check was given he cannot recover. *Ibid.*

[1] Franklin Bank *v.* Freeman, 16 Pick. (Mass.) 535; Cushing *v.* Gore, 15 Mass. 69. In Kelley *v.* Brown, 5 Gray (Mass.) 108, the court simply say that the pleadings are so imperfectly drawn that the questions which the plaintiff wished to have decided in his favor could not arise upon them at all. The decision is not in any respect at variance with the foregoing authorities.

[2] Skillman *v.* Titus, 3 Vroom (N. J.) 96.

memorandum check. But the bank is not bound to pay any attention to these words, or to recognize any contract as implied by them between the maker and payee which gives to the check any peculiar character. If such a check is presented for payment, and the drawer has to his credit funds sufficient to meet it, the bank must honor it precisely like any ordinary check. If the agreement or understanding between the drawer and the payee is that it shall not be presented for payment, any remedy of the drawer for the breach is solely against the payee. If the check is once drawn and delivered, the drawer's reliance that it will not be presented at the bank can rest only upon the good faith of the holder. He cannot drag in the bank as a partner in the arrangement, nor alter the duty of the bank to pay his drafts out of his deposit. This is a rule of law. Usage, or the customary understanding of business men to the contrary, cannot operate to change it.[3]

(*c*) An ordinary check cannot be shown by parol to be a "mem."[4] The practice of banks not to regard the word "mem." or memorandum" on checks has the sanction of law.[5]

§ 389. *Ante-dated and Post-dated Checks.* — A check may be either ante-dated or post-dated. An ante-dated check is payable immediately.[1] A post-dated check is payable on, or at any time after, the day of date.[1a] There is no question but that a post-dated check is in the United States a perfectly legal and proper instrument.[2] In England a statute used to require that a post-

[3] Dykers *v.* Leather Manufacturing Co., 11 Paige (N. Y.) 612; Story on Promissory Notes, § 499; Byles on Bills, p. *21, Sharswood's note; Daniel, Neg. Inst. § 1584.

[4] Kelley *v.* Brown, 4 Gray (Mass.) 108.

[5] State National Bank *v.* Reilly, 124 Ill. 464, 14 N. E. 657; Brown *v.* Cow Creek Sheep Co., 21 Wyo. 1, 126 Pac. 886 (1912).

[1] § 389. Story on Promissory Notes, § 490; Daniel, Neg. Inst. § 1578.

[1a] Smith *v.* Maddox-Rucker Banking Co., 8 Ga. App. 288, 68 S. E. 1092, affirmed in 135 Ga. 151, 68 S. E. 1031 (1910).

It cannot be paid before its date nor can money be retained, as against other checks, with which to pay it. But it is a negotiable instrument and the drawer cannot be charged by garnishee proceedings as the debtor of the payee. Wilson *v.* McEachern, 9 Ga. App. 584, 71 S. E. 946 (1911).

If a post-dated check is, before the day of its date, delivered to the bank on which it is drawn and there is no money of the maker of the check on deposit in the bank at the time, the president of the bank has no authority, by virtue of his office, to bind the bank to pay to the payee the amount of the check on the day of its date. Swenson Bros. Co. *v.* Commercial State Bank, 98 Neb. 702, 154 N. W. 233 (1915).

[2] Story on Promissory Notes, § 490; Harker *v.* Anderson, 21 Wend.

dated check should be stamped like a bill of exchange, and otherwise declared it invalid.[3] But no such rule has ever obtained in our own country. A post-dated check on its date, or after it, is payable immediately, just like any other check. We are now speaking of post-dated checks strictly, and not of instruments having the general form of checks but naming a day certain, or a certain number of days after date, for their payment. The construction and legal qualities of these instruments have been already discussed. But the simple post-dated check proper has none of their traits; neither is it subject to any of the questions which have been mooted concerning such other nondescript or mongrel documents. There is no possible pretence for claiming days of grace upon it. It is simply and unquestionably payable on demand, so soon as the day of the date comes around.[4]

Payment before Date is at Bank's Risk

(*a*) But it is the bank's own risk if it pay before that day.[4a] Such a payment is irregular, and circumstances may easily supervene under which the bank will be held to pay the amount again, or to restore it to the credit of the drawer, if it has debited him with it; which, however, it has no right to do. For it is unquestionable that in the interval between such irregular payment and the day of the date when the payment could be properly made, the amount ought still to be left standing to the credit of the drawer. The bank has no right to charge him with the disbursement till the time comes when the disbursement could be properly made on his account. His check is no order till it has matured. So if in the interval he continues to draw checks, the bank must continue to honor them upon presentment, so long as his account, without decrease by the debit to this item, is sufficient to meet them, until the day of the date arrives. When that day does arrive, the bank

(N. Y.) 372; Mohawk Bank *v.* Broderick, 10 *id.*, 304; 13 *id.*, 133; Salter *v.* Burt, 20 *id.*, 205; In the Matter of Brown, 2 Story 502; Smith *v.* Field, 19 Idaho 558, 114 Pac. 668, 1912C Ann. Cas. 354, n.

[3] Grant on Bankers and Banking; Watson *v.* Poulson, 7 Eng. L. & Eq. 585; 15 Jur. 1111; Allen *v.* Reeves, 1 East 435; Martin *v.* Morgan, 3 Moore (Eng.), 635; Byles on Bills, p.*17, text and note (Sharswood's ed.).

[4] Mohawk Bank *v.* Broderick, 10 Wend. (N. Y.) 304; 13 *id.*, 133; Harker *v.* Anderson, 21 *id.*, 372; Story on Promissory Notes, § 490; Daniel, Neg. Inst. § 1578. In the Matter of Brown, 2 Story 502.

[4a] Smith *v.* Maddox-Rucker Banking Co., 8 Ga. App. 288, 68 S. E. 1092, affirmed in 135 Ga. 151, 68 S. E. 1031 (1910).

may of course appropriate the sum it has paid out. But if then the intervening drafts have so diminished the depositor's balance that the remainder is not enough to meet the amount of the post-dated check, the deficiency must be the loss of the bank.[5] Its only source of restitution is from the depositor. Even the right to demand reimbursement from him may be taken away by his revocation in the interval before the maturity. If after the bank has paid, but before the date of the instrument gave it the right to pay, the drawer countermands his immature order and forbids payment, it is certain that the anticipatory action of the bank cannot operate to deprive him of this right.

(*b*) If a post-dated check falls due on a Sunday or on a legal holiday, presentment for payment cannot be made until the day following. Presentment on the day preceding is irregular. The bank is not bound to pay on that day. Accordingly a demand then made is so far erroneous that it will operate to discharge an indorser, unless it should be cured by a second demand properly made on the correct day subsequent.[6]

(*c*) A *bona fide* transferee of a post-dated check taking before date for an existing debt takes free of equities, and can recover of the maker though the check was without consideration.[7]

A post-dated check cannot be presented for acceptance before its date.[8] This fact that the payee or holder cannot go at once to the bank and have the check certified, illustrates the only difference between ordinary checks and those which are post-dated. The latter are not different in any respect after the day of their date arrives, but before that the depositor has a right to draw against his deposit freely, without regard to the outstanding check, and the bank cannot by certification before date withdraw funds from his control.

[5] Grant on Bankers and Banking; Da Silva *v.* Fuller, Chitty on Bills, 180 (10th Engl ed.), cited in Morley *v.* Culverwell, 7 M. & W. 178; Godin *v.* Bank of the Commonwealth, 6 Duer (N. Y.) 76; Byles on Bills, p. *14 (Sharswood's ed.).

[6] Salter *v.* Burt, 20 Wend. (N. Y.) 205.

[7] Mayer *v.* Mode, 14 Hun (N. Y.) 155; Schepp *v.* Carpenter, 51 N. Y. 602.

[8] See Sharswood's opinion in Champion *v.* Gordon, 70 Pa. St. 474, above quoted, § 384; Smith *v.* Maddox-Rucker Banking Co., 8 Ga. App. 288, 68 S. E. 1092, affirmed in 135 Ga. 151, 68 S. E. 1031 (1910).

Authority of Agent to Draw Post-dated Checks

(*d*) Authority to an agent to draw checks does not confer power to draw post-dated checks. Even authority to make time paper will not cover post-dated paper. When authority to make one kind of instruments is given, in order that another shall be within the power, not only must the legal effect be the same, but all their incidents so far identical that both may fairly be supposed to have been in the mind when the authority was given. The fact that a post-dated check or bill would not be forwarded at once for acceptance, like an ordinary check or bill, was taken advantage of by the agent to hide for a time his breach of trust in drawing a check for his own benefit.[9]

Authority to draw "bills" does not give a right to draw post-dated checks; the legal effect is not identical; bills of exchange have grace, post-dated checks no grace.[10] Post-dating does not interfere with the validity or negotiability of checks.[11]

§ 390. **Issuing.** *Delivery on Condition. Parol.* — As promissory notes and deeds require delivery to complete their validity as between the immediate parties to them, so also does a check require delivery, or, as it is more commonly called, "issuing."[0] It is said that a check is "issued" when it is in the hands of any person entitled to demand cash for it.[1] Thus, if it be stolen, or if after being lost by the drawer it is found by some other person, it is not, in the hands of the thief or of the finder, "issued" as against the drawer. But so far as concerns the bank it would be considered as issued, and the bank would be protected in paying it, provided it did so *bona fide*, and with no knowledge of the precedent circumstances. The law presumes that a check operates from its delivery, but it may be shown by parol that the delivery was not intended to put the check in operation until a certain event should transpire. As between the original parties, or those having notice, it is competent to show that the delivery was conditional.[2]

[9] New York Iron Mine *v.* Citizens' Bank, 44 Mich. 344, 6 N. W. 823 (1880). See Forster *v.* Mackreth, L. R. 2 Exch. 163.

[10] Salter *v.* Burt, 20 Wend. (N. Y.) 205; Taylor *v.* Sip, 30 N. J. L. 284.

[11] Burns *v.* Kahn, 47 Mo. App. 214.

[0] § 390. Hoit *v.* McIntire, 50 Minn. 466, 52 N. W. 918.

[1] Grant on Bankers and Banking, citing *Ex parte* Bignold, 1 Deac. 735; 2 Mont. & A. 633.

[2] Sweet *v.* Stevens, 7 R. I. 375; Wallis *v.* Littell, 5 Law T. Rep. N. S. 489; Murray *v.* Earl of Stair, 2 Barn. & Cr. 82; Pym *v.* Campbell, 25 L. J. Q. B. N. S. 277.

§ 391. **Of the Indorsement of Checks.** *Intent Governs as to Any One Having Notice of It.* — A check may be indorsed with various effects, according to the intention of the indorser. If the indorsement be made *animo indorsandi*, with the intention of guaranteeing, it will bind the indorser as a guarantor substantially in like manner as the indorser of a promissory note is bound. The case has arisen where a check payable to " A. or bearer " was by A. indorsed and delivered to B., and by B. transferred to the plaintiff. Upon presentment for payment it was dishonored, and plaintiff sued A. as an indorser. An elaborate argument was made to show that A. could not be held as the indorser of a negotiable instrument, but the court held the contrary. It was admitted that the indorsement had been made *animo indorsandi*. The case was decided upon the analogy of bills of exchange.[1] It is probable that this decision covers not only the indorsement made by the *payee* of the check, but by another person who should indorse, with the intention of becoming an indorser; for the check, in this instance, being payable to A. or *bearer*, did not require the indorsement of A. as a receipt or preliminary to payment, which would have been the case, at least by custom, had it been payable to A. or order.

The payee is liable on his indorsement although the holder before accepting the check obtains the assurance from the drawee that the check is good and will be paid.[1a]

When Indorsement is a Mere Receipt

But an indorsement not made *animo indorsandi*, but for some other special purpose, will not bind the party to the liability of a guaranteeing indorser, at least as towards any person chargeable with notice of such special intention. Thus, if a check be made payable to " A. B. or order," and A. B. himself presents it at the bank for payment, the strict construction of the phraseology of the check would entitle him to receive his money without indorsing. Yet it is customary to request A. B. to indorse. It is usually understood that this indorsement is intended to operate as A. B.'s receipt or acknowledgment that he has received the money, and if such be the intent the indorsement will have no other

[1] § 391. Keene *v.* Beard, 8 C. B. N. S. 372; Bank of State of New York *v.* Muskingum Branch of Bank of State of Ohio, 29 N. Y. 632.

[1a] Bank *v.* Carter, 88 Tenn. 289, 12 S. W. 545 (1889).

effect.[2] If it be intended as a guaranty of the genuineness of the check, it may be operative as such. Or if it be put on for any other specific purpose, its scope and consequences will be limited to such purpose, at least in the hands of any person having knowledge of the purpose. For example, where A. indorsed a check in the firm style of " B. & C." " per A.," and the cashier of the drawee bank required A. to identify himself, A. went out with the check, and returned with it bearing the indorsement of D., and presented it in this shape as furnishing a sufficient identification of himself by D. Thereupon the check was paid. A. had in fact no authority to indorse the name of " B. & C." The court held that D., by his indorsement, had undertaken only for the identity of A., not for A.'s authority to indorse, present, and collect the check.[3] Neither possession nor authority to accept constitutes authority to indorse a check.[3a]

But when a check was drawn payable to the order of A., and, in consequence of its dishonor by the bank, A. was sued by a subsequent holder, no defence was suggested, either by counsel or by the court, on the ground that A. might not have written his name on the back *animo indorsandi*. Nothing was said about this, but he was treated as an indorser guaranteeing payment. He was, however, allowed to escape on the ground that the check had not been presented with sufficient promptness after his indorsement had been placed upon it.[4] Also it was held that the burden of showing such due presentment was on the plaintiff. From this case it may be inferred that the presumption is that the indorser of a check intended to guarantee unless some other intent be affirmatively shown.

Where a collecting agent indorses simply his name without adding the word " agent," he is not chargeable as an indorser if it appears by a restrictive indorsement already upon the check that the agent has taken no title and is simply acting as agent.[5]

The transfer of a bank check payable to a married woman or

[2] Aubert *v.* Walsh, 4 Taunt. 293; Lloyd *v.* Sandilands, Gow 13; Keene *v.* Beard, 8 C. B. N. S. 372; Grant on Bankers and Banking; Byles on Bills, p. *24; Daniel, Neg. Inst. § 1648. See Hart *v.* Northwestern Trust etc. Bank, 191 Ill. App. 396 (1915).

[3] Commercial Press *v.* Crescent City National Bank, 26 La. Ann. 744.

[3a] Commercial National Bank *v.* Lincoln Co., 67 Ill. App. 166.

[4] Veazie Bank *v.* Winn, 40 Me. 62; but see Emery *v.* Hobson, 62 *id.* 578.

[5] National City Bank *v.* Wescott, 118 N. Y. 468, 23 N. E. 900.

bearer does not pass her title to it in Alabama, unless it is transferred with the consent of both husband and wife by indorsement.[6]

§ 392. **Effect of Indorsement by a Lunatic.** — B. was a lunatic not under guardianship. D. obtained by fraud his indorsement of a certificate of deposit. The bank that purchased the certificate was a *bona fide* holder for value. But the court held that no holder could be protected in such case any more than in a case of forgery, as the essential element of contract, viz. assent, was wanting, and as for negligence there could be none, "for one who is incapable of prudence cannot be guilty of negligence." [1]

This we think an error. We might with equal force say that one is incapable of goodness who cannot be bad, or one is incapable of lying who cannot tell the truth; on the contrary, that is just what they are capable of. The aim of the law is to favor virtue, prudence, and foresight, and throw their natural consequences upon imprudence and imbecility; and only where an arm of protection must be thrown about one as yet undeveloped, not because he is weak alone (that of itself is no good reason), but because he is weak now and *promises strength and value if cared for*, just as a florist cares for his budding plants, is there a just exception. Applying this basic principle to the case of lunacy, if we consider only the lunatic and the *bona fide* holder, there is certainly no reason to throw loss upon a *bona fide* holder in case it must be borne by such holder or the lunatic; let the latter recover from the wrongdoer if he can. Virtue and sanity should not be burdened that lunacy may lie upon the lap of luxury, but the natural consequences of lunacy should be visited upon it. If B. was only a little below par, the law would make him bear the consequences of his own short-comings and so help nature to exterminate human inferiority; but if he is entirely gone, the law, according to the above decision, will nurse him and pet him, as it does a rosy boy who bears in his breast a future noble manhood. This is much like saying, Let us throw away an apple if it has a speck in it, but if it is rotten to the core let us eat it.

Moreover, the real parties benefited by such decisions are the relatives of the lunatic, and they are surely guilty of negligence in not taking better care of him; while the bank had no actual

[6] First National Bank *v.* Nelson, 105 Ala. 199, 16 So. 707 (1894), citing Scharf *v.* Moore, 102 Ala. 468; Steiner *v.* Tranum, 98 Ala. 315, 13 So. 365.

[1] § 392. Anglo-California Bank *v.* Ames, 27 Fed. 727. See Wirebach *v.* First National Bank, 97 Pa. St. 543.

notice, nor, as the indorser was not under guardianship, not even the remotest constructive notice. Negotiable paper obtained by fraud or theft is good in the hands of a *bona fide* holder. Why does such a case as this call for more protection?

But although the reasons assigned for the decision above will not bear inspection, it is nevertheless true that, when we consider the necessity of repressing the fraudulent conduct of those who take advantage of lunacy, the case wears a different aspect. In ordinary cases of fraud, commerce may be left free without the hampering requirement that each new taker of negotiable paper shall examine the circumstances under which previous titles were acquired; the interest and intelligence of the person defrauded may well be relied on as a security against such conduct; but when these barriers are burned away by the fires of lunacy, it becomes necessary to oppose the tendency to fraud with the interest and intelligence of the taker of the paper. It is better that commerce should be a little burdened, than that the door of fraud should be left wide open with no sentinel on guard. The same considerations apply to the case of forgery of the drawer's or maker's name.

§ 393. **Checks payable to Bearer.** — Checks written payable to bearer pass by mere delivery. *Prima facie*, the holder is the owner. They are commercial paper, and, as such, a valuable consideration is presumed until proof of suspicious circumstances is introduced. Also it is presumed that they were issued by the maker. Possession is *prima facie* proof of title; but the plaintiff in a suit upon the check must show that he received it for value, and in due course of business.[1] Even where a check was not addressed to any particular bank, it was yet ruled that a holder for value might recover against the drawer on a count for money had and received.[2]

A check payable to bearer does not require indorsement. Nevertheless it may be indorsed, and the indorsee may be held by a

[1] § 393. Byles on Bills, p. *18; Daniel, Neg. Inst., § 1648; Keene *v.* Beard, 8 C. B. N. S. 372; Woods *v.* Schroeder, 4 Harr. & J. (Md.) 276; Cruger *v.* Armstrong, 3 Johns. Cas. (N. Y.) 5; Conroy *v.* Warren, *id.* 259; Merchants' Bank *v.* Spicer, 6 Wend. (N. Y.) 445; Sutcliffe *v.* McDowell, 2 Nott & Mc. C. (S. C.) 251; Murray *v.* Judah, 6 Cow. (N. Y.) 484; Glenn *v.* Noble, 1 Blackf. (Md.) 104; Humphries *v.* Bicknell, 2 Litt. (Ky.) 299; Shrieve *v.* Duckham, 1 *id.* 194; Mouran *v.* Lamb, 7 Cow. (N. Y.) 174; Hoyt *v.* Seeley, 18 Conn. 353; Unaka National Bank *v.* Butler, 113 Tenn. 574, 83 S. W. 655 (1904).

[2] Ellis *v.* Wheeler, 3 Pick. (Mass.) 18.

subsequent holder, as may also the indorsee of a check payable to order. To this end, however, the *animus indorsando*, the indorser's intent to render himself liable as a guarantor, must appear to be shown. This is by no means a necessary inference from the mere writing of the name across the back of the instrument, which may often be done for other purposes. Thus in England it is customary for the holder of a check, upon receiving payment of the same from the banker, to write his name upon the back, and the usage of business gives to this simply the signification of his receipt for the money. Such an indorsement of course creates no liability of any description further than that, if any, which could, under the peculiar circumstances of any individual case, grow out of a receipt expressed in full, in ordinary form.[3]

It seems that, as between the holder and indorser of a check, diligence in presentment must be used to enable the former to hold the indorser in the event of dishonor.[4] But notice of nonpayment apparently need not be given to the indorser with any especial promptitude, provided actual loss is not caused to him by the delay.[5]

Checks are commercial paper, and are generally affected by the rules which affect commercial paper. Thus the holder of a check payable to bearer, or indorsed in blank, is presumed to be the owner, *bona fide*, and for value. It is only after proof that the original issue of the check was a fraud, or that it was lost by the drawer before issue, that such a holder will be required to show his *bona fides*, to prove that he has given value for the check, and that he has come into possession of it in the usual course of business. If, being obliged to show these facts, he does so successfully, it then makes no difference under what circumstances of fraud or loss the check originally left the drawer's hands; the holder shall retain and shall recover upon it, at least as much as he has paid for it. Even where in the chain of title there is a gift, known to the holder, who nevertheless had no reason to suspect any irregularity for this reason, and who paid value in the due course of business, he shall still hold and recover.[6] These prin-

[3] Aubert *v.* Walsh, 4 Taunt. 293; Lloyd *v.* Sandilands, Gow 13; Keene *v.* Beard, 8 C. B. N. S. 372; Grant on Bankers and Banking; Byles on Bills, p. *24; Daniel, Neg. Inst., § 1653.

[4] Little *v.* Phœnix Bank, 2 Hill (N. Y.) 425; 3 Kent's Comm. *105, note *c*.

[5] Small *v.* Franklin Mining Co., 99 Mass. 277. It must be acknowledged that this is not a very satisfactory case, either in the decision or in the opinion.

[6] Fuller *v.* Hutchings, 10 Cal. 523; Case *v.* Mechanics' Banking Asso-

ciples of law will be found fully elucidated and carried out in all their details in works on bills and notes. They are usually discussed in considering questions which arise between the maker or drawer of the paper and a subsequent holder thereof. The general principles are broadly stated here, simply because from them follows as an unavoidable corollary, the rule that if a bank pays a check payable to bearer or indorsed in blank, upon presentment, to the holder thereof, having at the time no reasonable cause for suspecting any irregularity or any cause for refusing such payment, it will be protected in doing so, no matter what facts unknown to it may have occurred prior to the presentment. Even if the party presenting be the very individual who stole the check, before issue, from the drawer, or who found it after the drawer had lost it, still, since the bank has no possible opportunity of learning these facts, the drawer shall suffer the loss. A check payable to bearer or payable to order, and indorsed by the payee in blank, passes by delivery, just as fully and as freely as a bank note.[7] Neither does the rule of law, that an order or bill drawn on a particular fund is not negotiable, cover the case of a check; for this is drawn not against a particular fund, but against a general credit or account.[8] It might be added, too, that the custom of the banking business, which has been sometimes held even to give the holder of a check a right of action thereon against the bank, authorizes the negotiability, and renders it part of the contract between the bank and the depositor that his checks shall be paid when presented, no matter through how many hands they may have passed in the course of business negotiation.

§ 394. **Money given to Drawer of Worthless Check.** — Where money is paid to a person in exchange for his own check which is worthless, and is known to him at the time of the transaction to be worthless, the title to the money nevertheless passes to him. This rule was laid down in bankruptcy proceedings; the person who gave the check upon his bankers (who had for some time refused to honor his checks) went into bankruptcy, and the party to whom he gave it, and who gave him cash for it, filed a petition

ciation, 4 Const. (N. Y.) 166; Ross *v.* Bedell, 5 Duer (N. Y.) 462; Goodman *v.* Simonds, 20 How. 343, 15 L. ed. 934 (case of a bill of exchange); Gray's Administrator *v.* Bank of Kentucky, 29 Pa. St. 365 (do.); Fulweiler *v.* Hughes, 17 *id.*, 440; Stephens *v.* McNeill, 26 Barb. (N. Y.) 651; Townsend *v.* Billinge, 1 Hilt. (N. Y.) 353.

[7] Munn *v.* Burch, 25 Ill. 35.

[8] Keene *v.* Beard, 8 C. B. N. S. 372.

for reimbursement in full, on the ground that the title to the money did not pass. But the court held that the title did pass in spite of the known worthlessness of the check, that the money was part of the general assets of the bankrupt, and that the check-holder could only come in as an ordinary creditor and take his dividend.[1]

§ 395. **Transfer of Check sent by Mail.** — The title is in the sender until the check comes to the hands of the drawee, unless the latter has requested the sender to forward money to him by mailed check; in that case, the title vests in the drawee when the check is placed in the mail according to his instructions.[1]

If a depositor requests the bank to remit by draft, and the bank addresses the remittance according to the address contained in the letter of the depositor, it is not liable. The risk of transmission is upon the depositor.[2]

If A. directs B. to send money by check, and B. puts a letter containing the check in the post, properly directed, it becomes at once the property of A.[3]

Where A. in London wrote to B. in Suffolk, asking "to be favored with a check in the course of a week", and the check was stolen in transit and paid on a forged indorsement, it was held that, as the distance was too great to send a special messenger with the check, the debtor was entitled to regard the request as an order to send by mail, and, having conformed to this implied command, the post-office was the agent of both parties, and judgment

[1] § 394. *In re* King, 8 National Bankr. Reg. 285 (Ga.).

The passing of a fictitious check with intent to defraud is a criminal offence. People *v.* Walker, 15 Cal. App. 400, 114 Pac. 1009 (1911). Also the drawing a check on a bank and delivering the same for the payment of money with intent to defraud, as where the drawer has not sufficient funds on deposit with which to pay the check, or has no reasonable grounds to believe that it will be paid, is a criminal offence in many states. See People *v.* Mohr, 157 Cal. 732, 109 Pac. 476 (1910); State *v.* Pilling, 53 Wash. 464, 102 Pac. 230, 132 Am. St. Rep. 1080 (1909); Ryan *v.* State, 60 Fla. 25, 53 So. 448 (1910); State *v.* Winter, 98 S. C. 294, 82 S. E. 419 (1914); People *v.* Frey, 165 Cal. 140, 131 Pac. 127 (1913); People *v.* Bercovitz, 163 Cal. 636, 126 Pac. 479, 43 L. R. A. (N. S.) 667 (1912); Whitney *v.* State, 63 Fla. 53, 58 So. 230 (1912); Denton *v.* State, 66 Fla. 87, 62 So. 914 (1913).

[1] § 395. Talbot *v.* Bank of Rochester, 1 Hill (N. Y.) 295; Graves *v.* American Exchange Bank, 17 N. Y. 208; Watt-Harley etc. Co. *v.* Day, 1 Ga. App. 646, 57 S. E. 1033 (1907).

[2] Jung *v.* Second Ward Savings Bank, 55 Wis. 364, 13 N. W. 235 (1882). See First National Bank *v.* McManigle, 69 Cal. 156; Gurney *v.* Howe, 9 Gray (Mass.) 404; Warwicke *v.* Noakes, Peake N. P. 98; Burr *v.* Sickles, 17 Ark. 428.

[3] Indiana National Bank *v.* Holtschaw, 98 Ind. 87.

must be entered for the debtor in a suit by A. to recover the money.[4] The loss as between A. and B. very properly fell upon A., as it was a loss without B.'s fault, and falling upon the property of A. *Res perit domino.*

A. sent a check on the B. bank to the said bank, saying, " Please send me a check on some Boston bank for the enclosed check." B. sent by mail a check drawn by C. on a Boston bank, and the balance in currency. It was lost, and C. would not give a duplicate. *Held,* that the bank should have sent its own check for the whole. A check was less liable to be stolen than bills, and if its check had been lost it could have been duplicated without depending on the will of a third person. A. recovered in a suit for money had and received.[5]

§ 395 A. **Lost Checks.** — If a check be lost by the lawful owner thereof, and subsequently come into the hands of a *bona fide* holder for value and without notice, he will be entitled to receive the amount from the bankers. If they refuse to pay him, by reason of instructions to this effect given them by the drawer, the holder may recover the amount from the drawer.[1]

The fact that a check has not been presented or paid, and has been presumably lost after delivery by the drawer to the payee, and after it had been sent by the payee to a third party, does not constitute a sufficient consideration for the drawer's promise to such third person to give him a new check for the like amount.[2] But it seems that, under strong circumstances of equity and necessity, the drawer might be compelled to give a new check in place of a lost one, upon receiving a proper indemnity from the third party from whose possession the check was lost.[3]

So where the lost or destroyed check was one issued by the accountant-general in chancery, and had been so long outstanding that it would not be paid upon presentment, the Court of Chancery ordered a new check to be issued.[4]

[4] Norman *v.* Ricketts, 46 Lond. Bk. Mag. (June, 1886) 497.

[5] Ames *v.* York National Bank, 103 Mass. 326.

[1] § 395 A. Grant *v.* Vaughan, 3 Burr. 1525, 1526; 3 T. R. 177, 182. If the bank pays the check to the *bona fide* holder after being notified by the drawer not to do so the loser of the check has lost his title thereto and cannot recover from the bank. Unaka National Bank *v.* Butler, 113 Tenn. 574, 83 S. W. 655 (1904).

[2] Johns *v.* Mason, 9 Hare 29.

[3] Rhodes *v.* Morse, 14 Jur. 800. See First National Bank *v.* McConnell, 103 Minn. 340, 114 N. W. 1129, 123 Am. St. Rep. 336, 14 L. R. A. (N. S.) 616, n. (1908).

[4] Taylor *v.* Scrivens, 1 Beav. 571.

If a check given in absolute payment by clear agreement is lost, and paid on a forged indorsement, the true owner can recover of the bank, but not of the drawer. In case the check was taken without special agreement, and was therefore only conditional payment, we think the same rule should hold. The drawer has done his duty; it is through no fault of his that the payee does not get his money; the very payment of the check proves that the drawer was faultless in his undertaking; the check was good for the money, and, if accident or fraud deprive the holder of it, surely the loss should remain upon him, rather than on the drawer. Only by leaving losses where they fall as to innocent parties can care be encouraged; but in most cases the payee could recover from the bank.

However, in New York it is thought that the holder should recover of the drawer, except where the check was taken in absolute extinguishment of the debt.[5]

§ 395 B. **Conversion of Checks.** — A judgment for the conversion of a check indorsed in blank may be given for its face value in the absence of evidence showing its collection or real value.[1]

§ 395 C. **Stolen Checks.** — If a stolen check is deposited by the thief in the bank of a third person, who does not know thereof, as the easiest way of cashing the check and not with the intention to make the proceeds the property of the third person, and thereafter, before the owner of the bank account knows of the deposit, the thief draws out the entire sum so deposited, the owner of the bank account is under no liability to the person from whom the thief stole the money.[1]

[5] Thomson *v.* Bank, 82 N. Y. S. See the account of Norman *v.* Ricketts under "Title to Check sent by Mail."

[1] § 395 B. Lowell *v.* Hammond Co., 60 Conn. 500 (1895).

[1] § 395 C. Newell *v.* Hadley, 206 Mass. 335, 92 N. E. 507, 29 L. R. A. (N. S.) 908 (1910).

CHAPTER XXVIII

REVOCATION OF CHECKS

(1) By Countermand.

§ 397. Good against a donee or *mala fide* holder, or when the con-
§ 398. dition of delivery is not fulfilled.

Otherwise, the drawer has no right to revoke as against a *bona fide* holder; but if he does, the best opinion is that it is a question between himself and the holder, with which the bank has nothing to do, and that it should maintain strict neutrality, as in the case of any other adverse claim, paying neither party till it is secured or the question settled.

§ 398. Authority, however, is in conflict.

Illinois holds that a countermand is no excuse to a bank for refusal to pay.

Most courts hold that the bank must obey the countermand if received before payment or acceptance, and that the funds remain under the entire control of the depositor.

§ 399. Power to revoke *ceases* with certification, but the certification must be complete. If the check is only marked, and not yet delivered when the notice of revocation is received by the bank, no liability has been incurred by the bank, and the revocation takes effect.

(2) By Death. See §§ 549–551.

§ 400. The death of the drawer is usually held a revocation of the bank's authority to pay his uncertified checks, but the reason of the case is all the other way, and it is to be hoped the law will soon be cured by legislative medicine. One who takes a check from a man doing business alone may have to wait two or three years to get his money, till the estate of the drawer can be settled up, if the drawer dies, and the drawee knows it before presentment.

(3) By Insolvency of Drawer.

§ 400 A. Bank's authority to pay on the depositor's uncertified order ceases upon notice of his insolvency.

§ 397. **Revocation of a Check. — By Countermand. — By Death.** — This is a subject upon which authorities conflict. The Illinois doctrine is, that the order of a drawer to the bank not to honor a

certain check (A.) is no sufficient excuse to the bank for refusal to pay the same when subsequently presented. The general current of authority is very strong to the effect that the drawer may countermand. And much as we hesitate to differ with the Illinois courts, which seem perhaps the least hampered with mere technicalities and the most open to the light of reason and modern life of any of the State judiciaries, yet we think in this matter the pendulum has swung too far. The drawer can make a subsequent check, B., and, by presenting it before the check A., cut off the latter; or he can order the bank to transfer his deposit to the account of another depositor, or to hold it as a special or specific deposit, as for the payment of a note, or to transmit it at once to some point, and when A. is presented after such order has come to the bank, the check will not be paid because of insufficient unincumbered funds. And not only can the drawer in other ways accomplish the purpose of a direct countermand, but even if he could not, the question is properly one that lies entirely between the depositor and the check-holder, and with which the bank should not be called upon to interfere.

A countermand may be upon good cause, as when a check is a gift, or was not to take effect except on some condition that has failed. Is the bank to be required at its peril to look into such questions? Must it pay at peril of accounting to the drawer if his order was proper, or refuse to pay in peril of accounting to the holder if the order was improper? We think it is clear that the business of the bank should not be hampered in such manner, and that the only safe course is to hold in all cases of adverse claims that the bank may keep the fund until the parties settle the question between themselves, or one of them gives the bank a satisfactory bond of indemnity.

Perhaps a good plan would be to allow the depositor a certain number of days to desposit a bond in some court, with the provision that on order from the court the bank should hold the deposit free from the claim of the check, and if the depositor did not avail himself of the privilege, then the holder might do the same; but in no case ought the bank to be subject to suit except for improperly paying the fund with notice of an adverse claim.

§ 398. **Cases on Countermand.** — A check is simply a written order of a depositor to his bank to make a certain payment. It is executory, and as such it is of course revocable at any time before the bank has paid or committed itself to pay it. But after the

bank has paid, or has placed itself under an obligation, or has incurred a liability to comply with the order, the drawer's power to revoke is at an end. Thus, after the bank has, by acceptance of the check, directly undertaken and promised the holder to honor it, the drawer is as much deprived of his right to countermand it as if actual payment had been made. The remark once fell from Judge Story, in the oft-cited Matter of Brown, that the drawer of a check had no right to countermand payment at the bank. It was obvious from the context, that the judge referred rather to moral right than to legal right. He meant, simply, that a debtor who had given to his creditor a check in payment of the debt had no right as towards that creditor, "right" being considered as a matter of honesty, to order nonpayment of the check. The language of the judge, taken in isolation from the circumstances of the case, and from the remainder of the opinion, seems to admit a different meaning, and is therefore capable of a misinterpretation and misuse, which have sometimes been feebly attempted. But if such a misunderstanding is possible, still the authorities to the contrary effect are numerous, and leave no shadow of doubt upon the point. The bank is the drawer's agent. Its primary duty is to hold or to pay his money as he directs. Primarily it owes no duty to the holder, except under and by virtue of directions from the drawer. Until, by reason of these directions, it has assumed voluntarily, or by action of law has involuntarily come under, secondary and superseding obligations to the holder, the latest orders from the drawer govern its right to act on his behalf.[1]

[1] § 398. Gibson *v.* Minet, 2 Bing. 7; 1 Car. & P. 247; R. & M. 68; 9 Moore, 31; Dykers *v.* Leather Manufacturers' Bank, 11 Paige (N. Y.) 612; Scott *v.* Porcher, 3 Meriv. 652; Lilly *v.* Hayes, 5 Ad. & E. 548; Walker *v.* Rostron, 9 M. & W. 411; Malcolm *v.* Scott, 5 Exch. 601; Williams *v.* Everett, 14 East 582; Fruhling *v.* Schroeder, 2 Bing. N. C. 77; Morrell *v.* Wootten, 16 Beav. 197, which holds even that the rule is not affected by the fact that the person in whose favor the order was drawn had no knowledge of it, and no power to take advantage of it at any time prior to the revocation. Brind *v.* Hampshire, 1 M. & W. 372; also to the same effect, Grant on Bankers and Banking; Story on Promissory Notes, § 498; citing Purchase *v.* Mattison, 6 Duer (N. Y.) 587; Lovett *v.* Cornwell, 6 Wend. (N. Y.) 369; 1 Hall (N. Y.) 56; Jacks *v.* Darrin, 3 E. D. Smith (N. Y.) 557; First National Bank *v.* School District, 31 Okla. 139, 120 Pac. 614, 39 L. R. A. (N. S.) 655, n. (1912); Usher *v.* Tucker Co., 217 Mass, 441, 105 N. E. 360 (1913); Brown *v.* Cow Creek Sheep Co., 21 Wyo. 1, 126 Pac. 886 (1912); Taylor *v.* First National Bank, 119 Minn. 525, 138 N. W. 783, 1914A Ann. Cas. 1302, n.; Weiand's Adm. *v.* State National Bank, 112 Ky. 310, 65 S. W. 617, 56 L. R. A. 178 (1901); Pease *v.* State National Bank, 114 Tenn. 693, 88 S. W. 1040 (1905);

It may often be not only the lawful right of the drawer of the check, as towards the bank, to revoke the bank's authority to pay before presentment of the check; but it may be also his moral, as well as his lawful right. An instance of this kind occurred where a dispute arose between a creditor and an agent of a foreign debtor as to interest. At last the creditor agreed to accept the principal and give a receipt in full. No sooner however had he, upon these terms, received the agent's check for the principal, than he declared his intention to sue the debtor abroad, in the debtor's own country, for the interest. The debtor's agent at once stopped payment upon the check, and Lord Ellenborough upheld him in so doing, saying that the delivery of the check was made upon a condition which it at once appeared that the payee intended to elude. The delivery was conditional, and "all still remained *in fieri*." The stoppage of payment was justifiable, and rendered the draft "a piece of waste paper" in the payee's hands.[2]

The case cited of Gibson *v.* Minet affords a very strong illustration of the drawer's power of revocation. An order was given by the customer to his banker in the following terms: —

"Waterford, July, 1822.

"I request you to hold over 400*l.* from my private account to the disposal of J. Mintern & Co. Wm. Gibson.

"Messrs. Minet & Stride."

Kellogg *v.* Citizens' Bank, 176 Mo. App. 288, 162 S. W. 643 (1914); State Sav. Bank *v.* Buhl, 129 Mich. 193, 88 N. W. 471, 56 L. R. A. 944 (1901); Brinton *v.* Lewiston National Bank, 11 Idaho 92, 81 Pac. 112 (1905); Western Union Tel. Co. *v.* Louissell, 11 Ala. App. 563, 66 So. 839 (1914); Glennan *v.* Rochester Trust etc. Co., 209 N. Y. 12, 102 N. E. 537, 1915A Ann. Cas. 441, 52 L. R. A. (N. S.) 302, affirming 152 App. Div. 316, 136 N. Y. S. 747; Drinkall *v.* Movius State Bank, 11 N. D. 10, 88 N. W. 724, 95 Am. St. Rep. 693, 57 L. R. A. 341 (1901). See also Taylor *v.* First National Bank, 119 Minn. 525, 138 N. W. 783, 1914A Ann. Cas. 1302, n.

In South Carolina the drawer of a check cannot countermand its payment if it has passed into the possession of a *bona fide* holder. Loan & Savings Bank *v.* Farmers' etc. Bank, 74 S. C. 210, 54 S. E. 364, 114 Am. St. Rep. 991 (1906). See also Raesser *v.* National Exchange Bank, 112 Wis. 591, 88 N. W. 618, 88 Am. St. Rep. 979, 56 L. R. A. 174 (1902).

Countermand is not effective until it reaches the bank even though it was not received because of the negligence of the agent of the bank. Curtice *v.* London City etc. Bank, (1908) 1 K. B. 293.

[2] Wienholt *v.* Spitta, 3 Camp. 376. But see Watson *v.* Russell, 3 B. & S. 34; 31 L. J. Q. B. 304.

This order was delivered to a partner in the house of Mintern & Co. on July 8, and to Messrs. Minet & Stride on July 13. The drawer had funds to his credit to the amount called for. Upon the receipt of it, one of the bankers wrote upon the debit side of Gibson's account: "N. B. By Mr. Gibson's letter of the 8th July, 1822, 400*l.* is to be held at the disposal of Messrs. J. Mintern & Co." Mintern & Co. were customers with the same banker. On March 19, 1823, Gibson notified the bankers that he countermanded the order. The bankers immediately notified Mintern & Co., and desired instructions. Mintern & Co. replied, requiring the amount to be carried to their credit, and the bankers complied, and notified Gibson. The jury found that the order to the bankers was executory, and had not been acted upon at the time of the countermand, and the court held that the countermand was therefore in season, and good.

Another recent English case, also, well illustrates the operation of the doctrines of this section. A debtor gave a check in payment of his indebtedness. Before presentment of the check, garnishee process was served on him in a suit against the payee. The drawer at once countermanded his check, and directed that it should not be paid. The court held that by this stopping payment on the check the original debt from the drawer to the payee was revived, and was held by the garnishee process.[3]

Of course, so long as the drawer retains the right to countermand payment upon a check, he also retains the right himself to draw out any and all funds to his credit upon which the bank has no lien, or which have not been attached or sequestered by legal process. The question in each case alike is merely of his right to control the deposit. This right he possesses until the bank has paid it out, or promised or become bound to pay it out, upon some order emanating from him and presented for payment or acceptance at the bank counter, or until the operation of law intervenes by reason of some process. It is a matter of no consequence how many checks are, with the knowledge of the bank, outstanding in the hands of his creditors at the time of his counter direction or demand of payment of the whole fund to himself. The bank is not, and has no right to constitute itself, the agent of these parties,

[3] Cohen *v.* Hale, 3 Q. B. 371. Where payment has been stopped the relation between the drawer and the payee become the same as if the check had been dishonored and notice thereof given to the drawer, Usher *v.* Tucker Co., 217 Mass. 441, 105 N. E. 360 (1913); or as though it had never been given. Elliott *v.* Crutchley, (1903) 2 K. B. 476.

however honest may be their claims or hard their case. It not only owes them no duty, but it has not even any legal power to act in their behalf.

The drawer can countermand an uncertified check before it is paid, and take on himself the consequences.[4] But after it is paid to a *bona fide* holder for value, neither drawer nor bank can recall.[5]

But if the check is once certified, the drawer's power of revocation ceases, just as if payment had been made, for the bank is now the debtor.[5] Of course, this would not apply where the drawer had a check certified before delivery, until he should issue the paper.

In Illinois it is no defence for a bank that the drawer has countermanded ;[6] it must pay a *bona fide* holder for value, in spite of the drawer's order, for it is fraud in the drawer to revoke just as much as to withdraw, and a fraudulent command can be no excuse for the bank's failure of duty. The trouble is, the bank ought not to be called on to judge whether the order is a fraud or not.

§ 399. **Certification v. Revocation.** — While the check is ordinarily executory, and revocable, and the drawer may countermand its payment, when the bank has certified the check, and thereby comes under obligation to the holder to pay it on presentment, the power to revoke ceases as effectually as if actual payment had been made. The drawer's authority over the funds on which it is drawn terminates *pro tanto*. The same effect is produced when the law, by proper legal process, intervenes, and attaches or sequesters the fund.[1] The notices by which the drawer forbade the garnishees to collect the check, and the defendant revoked their authority to present it for payment, having been given after the certification of the check, and after the service of the garnishment, were ineffectual to change the rights of the plaintiff, or to displace any lien acquired by the legal process.[1]

[4] Albers *v.* Commercial Bank, 85 No. 173 (1884); Saylor *v.* Bushong, 100 Pa. St. 23.

[5] *Ibid.;* National Commercial Bank *v.* Miller, 77 Ala. 168.

[6] Union National Bank *v.* Oceana County Bank, 80 Ill. 212.

In South Carolina it is no defence for a bank that the drawer has countermanded even though the cause of the countermand was fraud or lack of consideration. Loan & Savings Bank *v.* Farmers' etc. Bank, 74 S. C. 210, 54 S. E. 364, 114 Am. St. Rep. 991 (1906).

[1] § 399. National Commercial Bank *v.* Miller, 77 Ala. 168; Merchants' etc. Bank *v.* First National Bank, 116 Ark. 1, 170 S. W. 852 (1914); Blake *v.* Hamilton Dime Sav. Bank Co., 79 Ohio St. 189, 87 N. E. 73, 128 Am. St. Rep. 684, n., 20 L. R. A. (N. S.) 290, n. (1908). See Pease etc. Co. *v.*

Delivery is Necessary to Make the Bank Liable, and Revocation before that is Binding

Where a bank had marked a check "good", but while still in the bank's possession, and before it had delivered the certified check to the holder, an order was received from the drawer revoking the check, it was held that the bank must obey the order. It had incurred no liability, for delivery of the check after certification was necessary to raise the obligations imported by a certified check, in the hands of a holder. And having incurred no liability, it was not free to create one by delivery in violation of the drawer's orders, and then expect him to bear the consequence.[2]

§ 400. **Revocation by Death.** — It is perfectly clear, that, where a check operates as an assignment, the death of the drawer will not revoke it. "Whether it be with or without consideration, a right once vested cannot be divested by the death of the party from whom it was acquired." [1]

It is also clear, that if a bank pays a check after the death of the drawer, being in ignorance of that event, the payment is good, and the bank not liable,[2] upon the general principle, that revocation of an agent's authority by death of a principal takes effect as to the agent only from the time the agent has notice of it.

But if the bank knows of the death of the drawer, its right to pay his checks has vanished; so say the authorities that do not regard a check as an assignment.[3] The title to the deposit passes

State National Bank, 114 Tenn. 693, 88 S. W. 172 (1905); Drinkall *v.* Movius State Bank, 11 N. D. 10, 88 N. W. 724, 95 Am. St. Rep. 693, 57 L. R. A. 341 (1901).

The same is true in regard to a cashier's check. Drinkall *v.* Movius State Bank, *supra*.

[2] Freund *v.* Importers & Traders' National Bank, 3 Hun (N. Y.) 689; see 12 Hun (N. Y.) 537.

[1] § 400. In substance taken from Lewis *v.* International Bank, 13 Mo. App. 207; Hill *v.* Escort, 38 Tex. Civ. App. 487, 86 S. W. 367 (1905); Philpot *v.* Temple Banking Co., 2 Ga. App. 742, 60 S. E. 480 (1907). See Raesser *v.* National Exchange Bank, 112 Wis. 591, 88 N. W. 618, 88 Am. St. Rep. 979, 56 L. R. A. 174 (1902); Elgin *v.* Gross-Kelly, 20 N. M. 450, 150 Pac. 922 (1915).

[2] 2 Parsons on Notes and Bills, 82. See next note. Weiand's Adm. *v.* State National Bank, 112 Ky. 310, 65 S. E. 617, 56 L. R. A. 178 (1901); Glennan *v.* Rochester Tr. etc. Co., 209 N. Y. 12, 102 N. E. 537, 1915A Ann. Cas. 441, n., 52 L. R. A. (N. S.) 302, affirming 152 App. Div. 316 (1912), 136 N. Y. S. 747; Raesser *v.* National Exchange Bank, *supra*.

[3] Tate *v.* Hilbert, 2 Ves. Jr. 118. In this case the check was a gift. See dictum in Burke *v.* Bishop, 27 La. Ann. 465; Cook *v.* Lewis, 172 Ill. App. 518 (1912); Weiand's Adm. *v.* State National Bank, 112 Ky. 310,

to the representatives,[3a] and can be drawn only on their order. And it is further said, that the bank's authority as agent is terminated by the drawer's death.

This we consider to be a perversion of reason, whatever may be the view taken of the question of assignment, —

(1) It is inconsistent to hold that a general deposit is a debt, and that the bank is not an agent or trustee or bailee in respect to it, and then, just to bolster up this error, turn completely about and say the bank is an agent, and must be governed by the rules of agency.

(2) Even admitting the claim that the rules of agency are to control, it may be answered that any agency clearly intended to be good after death is so held; as where goods are delivered to B. to be given to C. on the death of the donor.

(3) The death of the drawer of a bill of exchange works no revocation: why should a different rule obtain as to checks?[4]

(4) The personal representatives take the property of the deceased, subject to all proper claims against it. It is a fraud in the drawer to withdraw his funds during life, so as to prevent payment of the check. Is it any less a fraud for the representative to do the same, or for the law to do it in the name of technical fallacy?

(5) It places the obligation of a check outside the general rules and reasons of the law. The holder may sue the drawer on a

65 S. E. 617, 56 L. R. A. 178 (1901). See Pullen *v.* Placer County Bank, 138 Cal. 169, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19 (1901); Fisher *v.* Ludwig, 6 Cal. App. 144, 91 Pac. 658 (1907); Pennell *v.* Ennis, 126 Mo. App. 355, 103 S. W. 147 (1907).

The death of the drawer before presentment of the check operates as an absolute revocation of the power of the bank to pay upon his check. At the instant of his death the title to his balance vests in his legal representatives, and his own order is no longer competent to withdraw any part of that which is no longer his own property. (Tate *v.* Hilbert, 2 Ves. Jr. 111.) It has been laid down in the text-books, quite generally, that, if the payment be made by the bank in ignorance of the death of the drawer, the bank will be protected. (Grant on Bankers and Banking, Byles on Bills, Sharswood's ed., p. 24; Story on Promissory Notes, § 498 *a*, ed. 1868, p. 695.) Doubtless this would be so held. But it must be acknowledged that the cited case of Tate *v.* Hilbert, which the text-books all rely upon as their sole direct authority for the statement, does not touch upon the point, and furnishes no basis for considering that the rule has the support of so much as a single adjudicated cause. See, Daniel, Neg. Inst., § 1618 *b*.

[3a] Cook *v.* Lewis, 172 Ill. App. 518 (1912).

[4] Cutts *v.* Perkins, 12 Mass. 206; 2 Parsons on Notes and Bills, 287; Edwards on Bills, 454.

check; it is a binding contract. Why should this contract obligation be lessened by death more than others, or the right of the holder to demand payment of the bank, or of the bank to pay in precise accord with the contract evidenced by the check, be affected?

(6) Men who do business alone are put at great disadvantage in comparison with partnerships, by holding death a revocation. A firm check is good though a member die, for the firm lives; but a single business man works under the inconvenience of having his paper held less secure by the law.

(7) The only thing that reason and common sense demand in regard to checks after the death of the drawer is that they should be presented within such a reasonable time thereafter as not to embarrass or delay settlement of the estate; and it would seem well that by statute law provision should be made that in case of death of a depositor the bank should retain the fund for a certain time, say a month, for the payment of checks outstanding, allowing the representative to withdraw the fund before such period expires only on bond of indemnity.

Some rule, at any rate, sustaining the *post mortem* rights of check-holders is required by those considerations of security and good faith that underlie the whole mercantile law.

§ 400 A. **Revocation by Insolvency of Drawer.** — It has been carelessly laid down also in American text-books, that the commission by the depositor of an act of bankruptcy revokes the power of the bank thereafter to pay his checks. Readers consulting the works which make this statement will observe that they cite for it only English authorities. In fact, it is statutory law in England, and as such is peculiar to that country. It is not law in the United States. Indeed, there is no possibility of saying precisely at what stage of bankruptcy, in our country, the bank ceases to be justified in paying the bankrupt's checks. Certainly it is not when it first learns that he has committed an act of bankruptcy. Even the adjudication of bankruptcy, made upon the petition of the bankrupt himself or of his creditors, is an act so quietly done in the clerk's office that the bank can have no knowledge of it save by accident. Whether it would be obliged to take notice of it, if it heard it by rumor or report, is doubtful. Such authority is often untrustworthy. But the United States marshal is directed to take possession of all the effects of the bankrupt at an early stage in the proceedings. This is the first provision which the act affords for any authoritative notice to the bankers of the cessation

of the right of the bankrupt depositor to withdraw his balance. It is succeeded by publication in the papers, which doubtless must also be taken as notice, if none prior has been had. But it certainly seems that if, in the interval before such actual notice from the marshal or constructive notice by publication, the bank had continued to pay checks in good faith, and in ignorance, or perhaps even in an honest disbelief, of the pendency of bankruptcy proceedings, the bank can have done no wrong, and cannot be held to refund to the assignees the sum so paid away. If the bank pays on the bankrupt's check, when the law does not sanction the payment as a discharge *pro tanto* of the bank's debt, the right of action to recover the amount lies only in favor of the assignees in bankruptcy.

The English bankruptcy statutes save the foregoing question by forbidding payment only after "*notice* of an act of bankruptcy."[1] And this notice is required to be very certain, definite, and trustworthy.[2]

In England it has been laid down that, in the event of a customer committing an act of bankruptcy, the bank, immediately upon having knowledge thereof, must discontinue the payment of his checks. If any check be paid under such circumstances that an individual debtor could not discharge himself by a payment to the bankrupt, then the bank will, like such an individual debtor, be liable to refund the amount to the assignees in bankruptcy.[3] Nor can the banker defend, in such an action by the assignees, by showing that the person to whom the check was paid had had no notice of the drawer's bankruptcy, and might lawfully have received payment from him.[4]

[1] § 400 A. 12 & 13 Vict. c. 106, § 133.

[2] Evans *v.* Hallam, 6 L. R. Q. B. 713.

[3] Grant on Bankers and Banking; Mathew *v.* Sherwell, 2 Taunt. 439; 1 Rose 118; Vernon *v.* Hanson, 2 T. R. 287.

[4] *Ibid.*

CHAPTER XXIX

STATUTE OF LIMITATIONS

See §§ 301, 321.

§ 402. A check being payable on demand, the statute does not run until a demand (or some circumstance rendering a demand useless, § 322) has given rise to a right of action.

§ 402 *a*. New York, however, holds that the demand must be within a reasonable time (six years at the limit), in order to save the statute from running.

§ 402. **The Statute of Limitations.** — The same reasons which are used to prove that the statute does not run between the bank and a depositor apply to the case of a check, as to the right of the holder to sue the drawer.

The statute does not begin to run until a right of action accrues, and demand is a necessary preliminary to action; therefore the statute does not run between holder and drawer until demand.

And in the United States Supreme Court it is held that a check is not due until demand, and therefore the Statute of Limitations does not begin to run until that time, as a general rule;[1] but if the check is not drawn against funds, it is due at once, an action lies against the drawer immediately, without presentment, and therefore the statute begins to run at once, from the time the check is payable.[2]

(*a*) And in this case, beside announcing this reasonable principle, the court held that a bank check drawn in 1865, mislaid by the indorsee, and not presented till 1875, was barred by the six years' limitation, irrespective of the question whether the drawer had funds or not in the bank within six years after date. The

[1] § 402. Merchants' Bank *v.* State Bank, 10 Wall. 607, 19 L. ed. 1008. A check is not due till demanded. Cruger *v.* Armstrong, 3 Johns. Cas. (N. Y.) 5; Rothschild *v.* Corney, 9 Barn. & Cr. 389; Story on Notes, §§ 678, 679.

[2] Brush *v.* Barrett, 82 N. Y. 400.

court said that the holder cannot suspend the statute indefinitely by neglecting to make presentment, and a demand after six years will not be good unless the bank is under an obligation to pay, notwithstanding an unexplained delay. The rule requiring a demand is for the protection of the depositor, and cannot be used for his annoyance, and the holders' omitting to make a demand that he might make at any time will not keep the statute from running.[3] It is argued *contra*, that the delay in making demand benefits the drawer, as he has the money that much longer. (§ 322.)

This would seem to point to the conclusion that demand must be made within reasonable time in order to be the beginning of the statute, otherwise it will run from the date of delivery, or date of the paper, whichever is latest. Or perhaps the idea of the court is, that if no demand be made within six years, the action is barred; if a demand is made within six years, then the right of action against the drawer on account of nonpayment would run six years from the demand.

[3] Brush *v.* Barrett, 16 Hun (N. Y.) 409. See Wrigley *v.* Farmers' etc. Bank, 76 Neb. 862, 108 N. W. 132 (1906).

CHAPTER XXX

ACCEPTANCE AND CERTIFICATION

Object, Nature, Form, Authority, Effect, Statute of Limitations, Mistake.

§ 404. Acceptance not required, nor can it be demanded as a right.

§ 414. Objects.

To enable holder to use the check as money, and so render it possible for persons little acquainted with each other to deal safely and readily.

§ 405. Form.

§ 406. Usually the word "good" is written on the check.

§ 406. Any mark sanctioned by custom has the same effect and force.

§§ 406, 406 A. Verbal acceptance is good, if there are funds.

If no funds, it is a promise to pay the debt of another, and must be in writing, unless a consideration moves from the party to whom the promise is made; or perhaps if the holder does not know of the lack of funds; and some go so far as to hold that the Statute of Frauds does not apply to any commercial securities.

§ 407. Statutes in some States require it to be in writing.

§ 407 *a*. A promise to pay, communicated to the holder as inducement to take the check, is an acceptance by estoppel.

§ 408 *b*. Conditional acceptance may be made, as when there are no funds at the time of presentment.

(*c*) Acceptance to pay at a future day.

§ 409. Unreasonable retention may perhaps be an acceptance, though the weight of authority is, that retention alone will not amount to an acceptance, for the bank is under no obligation to send an answer to the holder; it is the duty of the latter to call on the bank to know its decision, allowing the bank twenty-four hours to examine its accounts.

§ 410. Charging the check to the drawer on the bank-books, or in a
§ 513. settlement with him, or paying 474 the check on a forged indorsement, is held to be an acceptance, and the true owner can sue the bank; but U. S. S. C. *contra*, as to the effect of payment. § 474 *b* and *f*.

Mistake in putting the check on the cancelling fork is not an acceptance.

§ 411. Delivery is essential to complete the certification, and raise liability of the bank.

§ 412. Place.

Acceptance away from bank does not bind bank. § 168 *d*.

§ 413. Authority to Certify. § 155 *d*.

Cashier, president, and teller have inherent power.

Assistant cashier or other subordinate has no inherent power.

The check must be regular in form, and not post-dated, or the officer cannot certify.

A national bank may certify.

Effect of Certification.

§ 414. If after Issue of the Check.

(*a*, *b*) It discharges the drawer, both on the check and on the original (*e*, *k*, *l*) debt; it is payment as to him and as to indorsers *before* certification.

(*b*) The drawer cannot sue the bank, though it refuse to pay a check that has been certified after issue.

(*a*) The bank is liable as on a certificate of deposit.

(*e*) The holder becomes in fact a depositor with the bank under the limitation that his deposit must be drawn by the certified check, instead of by checks he may draw at will.

(*e*) Though the check is stolen, a *bona fide* holder may sue the bank.

(*j*) But if the holder took with notice that the certification was not for purposes of negotiability, he is subject to equities.

(*f*) It is the officer's duty to charge the amount immediately to the drawer, and this transfers the deposit to the holder.

§ 414. But the bank is bound to an innocent holder of a certified check, though it had no funds, or they have been since withdrawn, or though the officer exceeded his authority, or even if a national bank should certify without funds, it is probable no one but the United States could take advantage of that fact. (See *Ultra vires*.)

§ 414. (*h*) The certification warrants only the drawer's signature and the possession of funds, and if the check was otherwise a forgery, as if the amount is raised before or after certification, the bank is not bound to pay the excess, and may recover it as money paid by mistake, so far as the error has not prejudiced an innocent party. (See Forgery.)

Whether evidence of a usage among banks and merchants to

(*i*) consider the bank bound at all events, *i.e.* warranting the body of the check is admissible. (?)

Louisiana holds that certification warrants the amount of a check at the time of certification, though it has been fraudulently raised before presentment for certification.

§ 478. Forgery. If a bank teller acknowledges the genuineness of a certification which in fact is forged, it is equivalent to an original certification, unless the mistake can be corrected without putting an innocent party in a worse position than if the teller had recognized the forgery when the check was presented to him.

The officer has no authority to warrant the body of a check, and inquirer has no right to rely upon his representations.

But if the bank has knowledge, or easy means of knowledge, of a matter regarding a check, it must not, by omitting to disclose

(*j*) it, cause damage to one inquiring with the evident purpose of

§ 482 *e*. acting on the reply. It must not omit such examination of its books as is usual in similar cases.

(Both New York cases, the latter a *dictum*.)

If Certified before Issue.

The drawer is not discharged until the certification is verified,
§ 415. *i.e.* until certified anew; but of course holder must present in due season, as in the case of an ordinary check.

So an indorser, who has a check certified before indorsing it, is liable on it, as an indorser on a note is responsible.

The bank is not absolutely liable on a check certified in the hands of the drawer until it has notice that the check is in the hands of some one who can demand payment of it from the drawer.

§§ 416, 417. The fund is subject to attachment by drawer's creditors un-
§ 415. til issue of the check; and in case of bank's insolvency before presentment, the drawer should be held upon due notice.

§ 417. An Attachment of the Drawer's Deposit.

Will therefore be good, though the deposit is covered by a certified check, which the bank has reason to believe is still owned by the drawer at the time of service.

§ 418. The Statute of Limitations.

Runs against a certified check only from the time of demand for payment.

§ 419. Mistaken Certification.

May be revoked if no innocent party is damaged by reliance on the bank's action; *i.e.* if all innocent parties are in the same position as if the bank had refused to certify the check when presented for that purpose.

§ 404. **Acceptance of Check not legally requisite; nor can it be claimed as a Right.** — The act by which the bank places itself under obligation to pay to the holder the sum called for by a check must be the expressed promise or undertaking of the bank signifying its intent to assume this obligation, or some act from which the law will imperatively imply such valid promise or undertaking. The most ordinary form which such an act assumes is the acceptance by the bank of the check, or, as it is perhaps more often called, the certifying of the check. A check is not an instrument which in the ordinary course of business calls for acceptance. The holder can never claim acceptance as his legal right. He can present for payment, and only for payment. But, on the other hand, there is nothing in the nature of a check which intrinsically precludes its acceptance, in like manner and with like effect as a bill of exchange or draft may be accepted. The bank may accept, if it chooses; and it is frequently induced by convenience, by the exigencies of business, or by the desire to oblige customers, voluntarily to incur the obligation.

§ 405. **Form.** — By writing "good" on check, or otherwise marking. Verbal acceptance; if no funds, Statute of Frauds prevents verbal acceptance, though this is the subject of conflict. Statute law. Communicated promise is an acceptance. So

charging the check to the drawer, or unreasonably detaining it (?); but not putting the check on cancelling hook by mistake. Delivery is essential to complete certification, and to create liability of the bank upon it. Conditional acceptance. Acceptance to pay at future day.

§ 406. **Written and Verbal Certification.**[0] — Ordinarily the acceptance or certification of a check is performed and evidenced by some word or mark, usually the word "good", written upon the check by the banker or bank officer. But at common law this is not necessary, and in the absence of a controlling and exclusive usage in favor of such writing, a verbal acceptance may be sufficient.[1]

"Any language,[1a] verbal or written,[1b] employed by an officer of a banking institution, whose duty it is to know the financial standing and credit of customers representing that a check drawn upon it is good, estops the bank from thereafter denying, as against a *bona fide* holder of the check, the want of funds to pay the same."[2]

A parol acceptance,[3] or a promise to accept a bill of exchange or draft, is valid under the law of Illinois, and may be implied as well as express.

[0] § 406. Certification of a check is the equivalent of an acceptance. Smith *v.* Field, 19 Idaho 558, 114 Pac. 668, 1912C Ann. Cas, 354, n. (1911); Blake *v.* Hamilton Dime Sav. Bank, 79 Ohio St. 189, 87 N. E. 73, 128 Am. St. Rep. 684, n., 20 L. R. A. (N. S.) 290 (1908); Meuer *v.* Phenix National Bank, 94 App. Div. 331 (1904), 88 N. Y. S. 83. But an acceptance is not equivalent to certification since it does not release the drawer. Milmo National Bank *v.* Cobbs, 53 Tex. Civ. App. 1, 115 S. W. 345 (1908).

[1] First National Bank *v.* Merchants' National Bank, 7 W. Va. 544; Pope *v.* Bank of Albion, 59 Barb. (N. Y.) 226; Milmo National Bank *v.* Cobbs, 53 Tex. Civ. App. 1, 115 S. W. 345 (1908), and cases cited *post* in this title.

[1a] The language must import an absolute promise to pay. First National Bank *v.* Commercial Sav. Bank, 74 Kan. 606, 87 Pac. 746, 118 Am. St. Rep. 340, n., 8 L. R. A. (N. S.) 1148 (1906); Home National Bank *v.* First State Bank (Tex. Civ. App.), 133 S. W. 935 (1911).

[1b] A written acceptance upon a check by an officer of a bank who has been authorized to accept by a cashier of another bank who had no authority to delegate his power is no acceptance. United States National Bank *v.* First etc. Savings Bank, 60 Or. 266, 119 Pac. 343 (1911).

[2] Pope *v.* Bank of Albion, 59 Barb. (N. Y.) 226; Milmo National Bank *v.* Cobbs, 53 Tex. Civ. App. 1, 115 S. W. 345 (1908); Merchants' etc. Bank *v.* First National Bank, 116 Ark. 1, 170 S. W. 852 (1914).

[3] Sturges *v.* Fourth National Bank, 75 Ill. 595. See Scudder *v.* Union National Bank, 91 U. S. 406, 23 L. ed. 245.

A conversation by telephone is admissible to show an acceptance.[3a]

A telegram from the president of a bank to a depositor, stating that certain funds are at the depositor's credit, is not an acceptance of a check drawn by the depositor upon receipt of the telegram.[4] But a telegram from one bank to another, upon inquiry, that it holds a deposit with which to pay a check of a particular description to be drawn upon it is equivalent to a statement that a check of such description is good and will be honored, and amounts to an acceptance, where the bank in reliance thereon is induced to discount the check.[5]

Even though an acceptance or certification must now in many states, by statute, be made in writing an acceptance may be made by telegram.[6]

§ 406 A. **Parol Acceptance and the Statute of Frauds.** — (1) Where a person verbally accepts or promises to accept a bill on some new and independent consideration, moving from the party to whom the promise is made, as that he shall buy a certain bill already drawn, or to be drawn, which he actually does on faith of the promise, the Statute of Frauds does not apply. The promise is an original one on sufficient consideration. "If A. says to B., Pay so much money to C., and I will repay you, it is an original independent promise; and if the money is paid on the faith of it, it has always been deemed an obligatory contract, though it be by parol, because there is an original consideration moving between the parties." [1]

(2) When the acceptor has funds of the drawer, the statute cannot apply, for the promise is not to pay the debt of another, but to pay the promisor's own debt to the drawer in a particular way, namely, by paying the drawer's debt to some third person.[2] (See § 408 A.)

[3a] Godair *v.* Ham National Bank, 225 Ill. 572, 80 N. E. 407, 116 Am. St. Rep. 172 (1907); Wigmore on Evidence, §§ 669, 2155.

[4] Maritime Bank *v.* Union Bank, 4 Montreal L. R. (S. C.) 244.

[5] Elliott *v.* First National Bank, 105 Tex. 547, 152 S. W. 808 (1913). But see First National Bank *v.* Commercial Sav. Bank, 74 Kan. 606, 87 Pac. 746, 118 Am. St. Rep. 340, n., 8 L. R. A. (N. S.) 1148 (1906). State Bank *v.* Citizens' National Bank, 114 Mo. App. 663, 90 S. W. 231 (1905).

[6] Wells *v.* Western Union Tel. Co., 144 Iowa 605, 123 N. W. 371, 138 Am. St. Rep. 317, 24 L. R. A. (N. S.) 1045, n. (1909); First National Bank *v.* Muskogee etc. Co., 40 Okla. 603, 139 Pac. 1136 (1914).

[1] § 406 A. Townsley *v.* Sumrall, 2 Pet. 170, 7 L. ed. 386.

[2] Putney *v.* Farnham, 27 Wis. 187; Shields *v.* Middleton, 2 Cranch (C. C.) 205; Spadone *v.* Reed, 7 Bush (Ky.) 455; Besshears *v.* Rowe, 46

(3) If there are no funds of the drawer in the hands of the acceptor, nor any consideration for his promise to bring the case under (1), — First, when the payee or holder does not know the fact that there are no funds, the law of estoppel clearly applies; the acceptor admits that he has funds by the very act of acceptance. It would undoubtedly be better if parol acceptance were barred out entirely. Negotiable paper ought to be protected by all reasonable means of attaining certainty and precision, and so far as possible it should carry its character and condition on its face. But as parol acceptances are allowed, the established principles of law should be applied, and when A. by such acceptance leads B. to rely upon it, and refrain from taking such steps to secure himself as he otherwise might, A. is clearly estopped to deny the existence of funds, a fact peculiarly within his own knowledge. There are cases, however, which hold a parol acceptance without funds void under the Statute of Frauds, without inquiring as to the knowledge of the holder.[3] Such cases look to the actual facts as constituting the contract, and not to the understanding between the parties. Second, if the holder knew of the want of funds, and the case does not come under (1) or (2), it may seem clearly within the statute as a promise to pay the debt of another, and so understood by both parties;[4] but some authorities strongly defend the view that commercial engagements, regulated by the law merchant, are beyond the Statute of Frauds altogether.[5]

§ 407. The law in England used to allow parol acceptance; but the statutes 1 & 2 Geo. IV. c. 78, § 2, and 19 & 20 Vict. c. 97, § 7, require an acceptance in writing. Some of the States of the Union have enacted laws to a similar effect.

In New York a statute requires acceptance of a bill of exchange to be made in writing, and the courts have held that a check is so far like a bill of exchange as to fall within this statute, and that the verbal promise of the bank to pay it is of no effect.[1] And in

Mo. 501; Pike *v.* Irwin, 1 Sand. (N. Y.) 14; Spaulding *v.* Andrews, 48 Pa. St. 411.

[3] Pike *v.* Irwin, 1 Sand. (N. Y.) 14; Manley *v.* Geagan, 105 Mass. 445; Quin *v.* Hanford, 1 Hill (N. Y.) 82; Plummer *v.* Lyman, 49 Me. 229; Wakefield *v.* Greenhood, 29 Cal. 600.

[4] Carville *v.* Crane, 5 Hill (N. Y.) 583; Taylor *v.* Drake, 4 Strobh. (S. C.) 431.

[5] Barker *v.* Prentiss, 6 Mass. 430; Chitty on Bills, p. 4; Spaulding *v.* Andrews, 48 Pa. St. 411; Throop on Verbal Agreements, p. 159; Pillans *v.* Van Mierop, 3 Burr. 1674.

[1] § 407. Risley *v.* Phœnix Bank, 83 N. Y. 318. See Inter-State

Pennsylvania acceptance must be in writing where the amount exceeds twenty dollars.[1a] In Illinois the Statute of Frauds does not hinder the parol acceptance of an existing check.[2]

(*a*) A promise to pay if *communicated* to the holder and acted on by him as an inducement in taking the check, is an acceptance.[2] If not communicated, it would be no acceptance.[3]

(*b*) In Morrell *v.* Wootten [4] it is laid down that, when a depositor directs his banker to make a payment to a third party, if the banker consents to do so and the direction is made known to the third party, then the banker's assent inures to his benefit. The privity is complete, and the third party may compel payment by his own suit brought directly against the banker. But the communication to the payee is absolutely essential. The reason that such stress is laid upon this point is to be discovered in the fact that the order for payment is to be met from a general fund. Where the order is for the payment of a particular fund, the consent of the beneficiary is needless; for this latter transaction constitutes properly an assignment,[5] and since it is for his benefit his assent is supposed.

§ 408. It is an inference from the indirect intimations and language of many of the causes which form the authorities on this point, that this is one of the matters in which the analogy of bills of exchange would be regarded as directly in point, and probably as conclusive.[1] It is a *semble* in the case of Barnet *v.* Smith, cited below, that the cashier's simple statement that a check is "good" is an acceptance or certification equally with the writing of the word itself.

Since the foregoing was written, this subject has been discussed

National Bank *v.* Ringo, 72 Kan. 116, 83 Pac. 119, 115 Am. St. Rep. 176, 3 L. R. A. (N. S.) 1179, n. (1905); Van Buskirk *v.* State Bank, 37 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182, (1905); Ewing *v.* Citizens' National Bank, 162 Ky. 551, 172 S. W. 955 (1915).

[1a] Bank *v.* Lindeman, 161 Pa. St. 199, 28 Atl. 1022.

[2] Nelson *v.* First National Bank, 48 Ill. 36. See Carr *v.* National Security Bank, 107 Mass. 48.

[3] Bank *v.* Pettit, 41 Ill. 492. [4] 16 Beav. 197.

[5] To this point are cited Row *v.* Dawson, 1 Ves. Sen. 331; *Ex parte* South, 3 Swanst. 392.

[1] § 408. Barnet *v.* Smith, 10 Foster (N. H.) 256; Lemmon *v.* Box, 20 Tex. 329 (bill of exchange); Wheatley *v.* Strobe, 12 Cal. 92; Fruhling *v.* Schroeder, 2 Bing. New R. 77; Lumley *v.* Palmer, Strange, 1000; Harwicke, 74; Robson *v.* Bennett, 2 Taunt. 388; Grant on Bankers and Banking; Lilly *v.* Hays, 5 Ad. & El. 548; First National Bank *v.* Currie, 147 Mich. 72, 110 N. W. 499, 118 Am. St. Rep. 537, 9 L. R. A. (N. S.) 698, n. (1907).

by the Supreme Court of the United States,[2] who seem very reluctantly to concede that the rule has been established to the effect that a verbal certification is legally sufficient. They say, "The authorities relied on are mainly acceptances of drafts or bills of exchange. . . . The highest courts in this country and in England have regretted the decisions which gave original sanction to this proposition";[3] *i.e.* that a draft or bill might be verbally accepted. The distinction is pointed out, that the written certification is an undertaking to all the world of such character and effect that the check so certified can circulate as money; whereas, the verbal representation is made only for the guidance of the payee or holder making the inquiry.[4]

Verbal Acceptance not Good in Case there are No Funds

(*a*) In the United States Circuit Court for the First Circuit, Judge Shepley has gone much farther still. The check of one Beal was presented by the payees to the bank on which it was drawn, and payment requested. The cashier replied that if the check should be presented through the clearing-house in due course it should be paid. The payees accordingly deposited it in their bank; but when it came through the clearing-house to the drawee bank on the following morning, it was dishonored. At the time when the cashier made this statement or promise to the payees, the drawer had no funds in the bank; but the cashier did not state this fact, nor had the payees any knowledge of it, unless they were bound to take notice of it or to infer it from the fact that the cashier refused or was unwilling to have the check paid over the counter. Apparently the judge was of opinion that this refusal or unwillingness was notice of the lack of funds. The pleadings were in such shape that the question of the cashier's authority could not be raised. The plaintiff averred the *promise of the bank*, and the demurrer admitted it. The court, nevertheless, held that no obligation was fastened upon the bank. The debt was still the debt of Beal, and the promise of the bank was the promise to pay the debt of another, and therefore void under the Statute of Frauds, since it was not in writing. At any time until the checks were in fact paid, the payees could ignore them, and enforce the original

[2] Espy *v.* Bank of Cincinnati, 18 Wall. 604, 21 L. ed. 947.
[3] Boyce *v.* Edwards, 4 Pet. 111, 122, 7 L. ed. 799.
[4] Espy *v.* Bank of Cincinnati, 18 Wall. 604, 21 L. ed. 947.

debt against Beal, which was not extinguished by the check till the check itself was paid. The payees therefore parted with no right, and were put in no worse position, by reason of the promise.

On the other hand, no consideration passed to the bank. There being no funds, it could not be compelled to pay at the time, and the postponement of presentment was no consideration; had the bank had funds and been bound to pay at the time of the first presentment, it might have been different, for then the engagement would have been substantially to pay the drawee's own debt to the drawer. "It cannot be perceived how any sound reason can be given why a verbal acceptance or promise to accept, *for the mere accommodation of the drawer*, without funds or value received, should not be treated as within the statute." The regret expressed by the Supreme Court that verbal acceptances have ever been held sufficient is reiterated; and the court say that "the reasons given for holding good a parol accommodation acceptance of a bill of exchange do not apply to the case of a bank check. The distinguishing characteristics of checks, as contradistinguished from bills of exchange, are that they are always drawn upon a bank or banker, that they are payable immediately upon presentment without the allowance of any days of grace, and that they are never presentable for acceptance, but only for payment. The promise declared on does not amount to an acceptance. If it be treated either as a promise to accept or a promise to pay, it cannot avail the plaintiffs. No consideration to support the promise appears. The checks were not taken on the faith of such promise. The holder gave nothing and relinquished no advantage for the promise." It was carefully noted that the plaintiffs were not persons who had taken the checks *bona fide* for value, upon the strength of the promise of the bank. Much of the reasoning in this opinion is far from being conclusive or unanswerable. In this case the holder did not know there were no funds, and it seems just that the principle of estoppel should be applied to hold the bank. (See § 406 A.)

Conditional Acceptance

(*b*) The promise of the banker must be absolute. If it be contingent, or if it be other than a distinct promise of outright and unconditional payment, it does not bind him as an acceptance. Thus, a depositor ordered his banker to hold a certain sum at the disposal of A., and notified A. of his action. The banker likewise

notified A. of the direction he had received, and that he had registered it. He declined, however, for the present, to accept bills for any part of the amount, since he was already in advance to his customer; and positively undertook and promised only that, if remittances should come forward so that he should be enabled to comply with the directions, then he would promptly advise A. The court held that no contract arose with A., and that he had no remedy either in law or in equity against the banker.[5]

An interesting case of conditional acceptance arose in West Virginia. The U. S. Rev. Sts. § 5208, declare it to be unlawful for a national bank to certify a check, unless the drawer has, at the time of presentment for certification, sufficient funds in the bank to meet the check. A check was presented, and the cashier promised the holder that it should be paid in case a draft deposited for collection by the drawer of the check should be duly paid. The draft was duly paid. The court held that thereupon the obligation of the bank to pay the check was complete and binding. A statute prohibiting certification of checks when the drawer's funds are insufficient does not invalidate a promise on the part of the bank to pay a check at a future day, when the drawer shall have enough funds for that purpose in its possession. In other words, this was not a certification absolute, which would have been bad for lack of funds, but a certification contingent, which could not come into force until the funds should be received and the law satisfied.[6]

Acceptance to Pay at a Future Day

(c) If the bank only accepts or certifies generally, its obligation is to pay at any time when the holder may make demand. But if the acceptance is to pay at a future day certain, then the transaction, as between the bank and the drawer, is equivalent to a loan of the amount made by the drawer to the bank for the period intervening between the acceptance and the date named for payment. During that interval the bank has a right to retain from the funds of the drawer in its hands a sum sufficient to meet the acceptance when it shall fall due.[7]

[5] Malcolm *v.* Scott, 5 Exch. 601; 3 Mac. & G. 29.

If a drawee marks a check "Paid" and lays it aside to await a remittance to cover the check there is no acceptance. First National Bank *v.* First National Bank, 127 Tenn. 205, 154 S. W. 965 (1912).

[6] First National Bank *v.* Merchants' National Bank, 7 W. Va. 544.

[7] Bank of England *v.* Anderson, 4 Scott 50.

Although acceptance to pay at a future day is valid,[8] such promise is binding for a reasonable time only.[9]

A promise by a national bank to pay all checks that may be drawn upon it by a certain person, without limit as to time and amount, does not amount to a certification but is a guaranty and is *ultra vires*.[10]

In Pennsylvania a bank is not bound by the verbal promise of its president that a check will be paid if the holder will retain it a few days.[11]

§ 409. **Retention.** — It occasionally happens that a check is presented to the bank, and is not paid upon the spot by the bank, but is retained by it. If this happens without any distinct contemporaneous agreement between the holder and the bank as to the conditions and purpose of the retention, it will not operate as an acceptance of the check by the bank, unless the retention is continued for an unreasonable length of time without explanation on the part of the bank. If the check is sent to the bank through the mail, it has even been said that the bank may hold it any length of time without incurring the liability of an acceptance. For the mere fact that a check is handed into a bank creates of itself no obligation on the part of the bank to notify the holder that it will not be paid. It is his duty to call, after a reasonable period has elapsed, and demand payment, or ask whether or not it will be paid; and after the lapse of such time it will be the duty of the bank to pay or to answer him; but not before that time, for the bank always has a reasonable period for examining its accounts before it can be required to pay, or to answer whether or not it will pay. In the case of Bellasis *v.* Hester [1] such period was said to be twenty-four hours. In the case of Overman *v.* Hoboken City Bank,[2] a check drawn to the order of the plaintiff was deposited in the Bank of Commerce, in New York City, and was by that bank transmitted

[8] La Banque du Peuple *v.* La Banque d'Exchange, 1 Montreal L. R. (S. C.) 231; Exchange Bank *v.* La Banque, 3 Montreal L. R. (Q. B.) 232.

[9] Seventy days is a reasonable time. Leach *v.* Hill, 106 Iowa 171, 76 N. W. 667 (1898).

[10] Bowen *v.* Needles National Bank, 87 Fed. 430 (1898).

[11] Bank *v.* Lindeman, 161 Pa. St. 199, 28 Atl. 1022.

[1] § 409. 1 Ld. Raym. 280. See, also, Wisner *v.* First National Bank, 220 Pa. St. 21, 68 Atl. 955, 17 L. R. A. (N. S.) 1266, n. (1908); First National Bank *v.* First National Bank, 127 Tenn. 205, 154 S. W. 965 (1912) (statute).

[2] 2 Vroom (N. J.) 563.

to the Ocean Bank for the purpose of being sent thence to the defendant bank for payment. It was received, by this means, by the defendant bank, October 31, between twelve and one o'clock, noon, and by it was retained till twelve M. on the following day, when it was returned to the Ocean Bank marked "not good." At ten o'clock A.M. on the day following the Ocean Bank sent it back to the Bank of Commerce, which immediately notified the plaintiffs of the dishonor. The court held that the mere retention of the check by the defendants did not constitute an acceptance by them, or bind them to a payment. The court said, a banker may retain a check twenty-four hours to examine his accounts and see if he will accept; "after the lapse of this time the holder has a right to know if the check or bill is to be honored or dishonored, but it is his duty to wait upon the drawee to ascertain this." [3] In the absence of usage or mode of dealing, or circumstance of conduct amounting to estoppel, the best opinion is that mere retention will not operate as an acceptance, whatever be the length of time, for the drawee is not obliged to send an answer even when the holder sends the check to it by mail, but may safely wait in silence till the holder makes some further move.[4] In the case of a check sent by mail, however, it might seem more just and reasonable to hold that the bank is the agent of the holder to return an answer in reasonable time; but we must remember that the bank's duty in regard to checks is only to pay them over its counter, and it cannot be burdened with correspondence in addition to this duty, unless by its consent.

The New Jersey case above is cited in Judge Story's work on Promissory Notes, as settling the law upon this point. But it should be noted that the above doctrine is only that of the common law, unaffected by the introduction of evidence relating to the understanding and usage of business in any special locality. In the case of Overman *v.* Hoboken City Bank, the banks were situ-

[3] Overman *v.* Hoboken City Bank, 2 Vroom (N. J.) 563. Twenty-four hours is deemed a reasonable period for the drawee of a bill to deliberate and look to the state of his accounts. Connelly *v.* McKean, 64 Pa. St. 113; Montgomery County Bank *v.* Albany City Bank, 8 Barb. (N. Y.) 399; Bellasis *v.* Hester, 1 Ld. Raym. 280; Case *v.* Burt, 15 Mich. 82.

[4] In Jeune *v.* Ward, 2 Stark. 326, Lord Ellenborough held it to be the duty of the drawee to return the bill, but the Court of King's Bench reversed his ruling, though the bill had been retained a month. Parsons agrees with the text. 2 Pars. B & N. 284, and Chitty on Bills, 175. See Daniel, Neg. Inst., § 1619.

ated in different States, and custom could probably not have been shown. Had all the banks been in New York City, such evidence would probably have been offered. The matter is one concerning which there is usually a definite and well-understood usage in every business community.

In Pennsylvania it has been said: "If a bank does not pay or accept, it is bound to refuse. It has no right to receive and keep the check indefinitely, thereby leaving the holder to suppose that it has accepted the check and assumed its payment.[5]

In Tennessee it has been held that acceptance of a check and a promise to pay it in accordance with directions is inferred where the drawee bank receives and retains it and charges it to the account of the drawer, who has sufficient funds on deposit to meet it and who consequently lifts such check upon settlement with the bank.[5a]

In England it is held that a banker may retain a check until next day to see if he is in funds. He is entitled to one day's time, and such delay does not make him liable as for acceptance.[6] If funds come in while holding the check, they must be applied to it.

§ 410. **Putting on Cancelling Fork. — Charging Drawer.** — Placing a check on the cancelling fork by mistake does not amount to acceptance, nor prevent return of it on discovering that it is not correct in form, or that there are not sufficient funds.[1] But deducting the amount of a check from the drawer's account is an acceptance.[2] So if the amount of an outstanding check is retained by the drawee bank in a settlement with the drawer, it is an implied acceptance.[3] But if the payment or settlement is by mistake, as in case of payment on a forged indorsement, the United States Supreme Court deny that there is any acceptance. (§ 474, *e*, *h*.)

§ 411. **Delivery necessary to Complete Certification.** — The bank's liability upon a certification does not arise upon the mere marking the check "good", but upon the delivery of the certified check to the holder, or person who presents it.[0] If it receives orders

[5] First National Bank of Northumberland *v.* McMichael, 106 Pa. St. 464.

[5a] Pickle *v.* Muse, 88 Tenn. 389, 12 S. W. 919 (1890).

[6] Kilsby *v.* Williams, 5 Barn. & Ald. 815; Boyd *v.* Emmerson, 2 Ad. & E. 184.

[1] § 410. National Bank of Rockville *v.* Second National Bank of Lafayette, 69 Ind. 479 (1880).

[2] Seventh National Bank *v.* Cook, 73 Pa. St. 483; Pratt *v.* Foote, 9 N. Y. 466; Pickle *v.* Muse, 88 Tenn. 389, 12 S. W. 919 (1890).

[3] Saylor *v.* Bushong, 100 Pa. St. 23.

[0] § 411. In Tennessee there is no acceptance until it is completed by delivery or notification and in the absence of an agreement between the

from the drawer revoking the check, after it is marked but before it is delivered, it delivers the check at its own risk; if, however, it had delivered before receiving the order, it would have been unnecessary to pay any attention to said order, as it would be of no effect.[1] A bank cannot refuse to pay a certified check because of a countermand after the certification is complete.[2]

§ 412. **Acceptance away from the Bank.** (§ 168, *d.*) — An acceptance by the cashier away from the bank is not valid, and will not bind the bank nor exclude creditors from holding the deposit against which the check was drawn under an attachment served after the outside acceptance was made.[1]

§ 413. **Authority to Certify.** — Cashier, president, and teller[0] have inherent power, assistant cashier or any sub-officer not. Check must not be irregular[0a] or post-dated;[0b] but bank may be liable to innocent holder though the officer exceeded his power.[0c] National bank may certify if funds are sufficient, or accept conditionally if funds are not sufficient.

The authority of a subordinate officer to certify must be shown by a course of dealing or actual authorization.[1] The cashier has

drawer and drawee for overchecking and in the absence of the holder's knowledge of and reliance upon a custom of overchecking no liability arises by marking "Paid" upon it; and when the drawee is acting in a dual capacity of collecting agent of the holder and as drawee there can be no acceptance by delivery until the bills are passed through the books of the bank, charging the account of the drawer and crediting the account of the submitting bank, and making a complete transaction. First National Bank *v.* First National Bank, 127 Tenn. 205, 154 S. W. 965 (1912).

[1] Freund *v.* Importers & Traders' National Bank, 3 Hun (N. Y.) 689; 76 N. Y. 352; 12 Hun (N. Y.) 537.

[2] Nassau Bank *v.* Broadway Bank, 54 Barb. 54 (N. Y.) 236.

[1] § 412. Bullard *v.* Randall, 1 Gray (Mass.) 605.

[0] § 413. Muth *v.* St. Louis Trust Co., 94 Mo. App. 94, 67 S. W. 978 (1902), holds that the court did not err in refusing to instruct the jury that the teller had implied authority to certify checks.

[0a] Even though a check is not signed by the drawer when certified, it becomes binding on the bank as soon as the drawer signs it. Kelling *v.* Edwards, 116 Minn. 484, 134 N. W. 221, 38 L. R. A. (N. S.) 668 (1912).

[0b] In Idaho a check dated September 10th and certified July 15th preceding was taken by a clerk of court and it was held that such was a substantial compliance with a statute requiring a deposit of money. Smith *v.* Field, 19 Idaho 558, 114 Pac. 668, 1912C Ann. Cas. 354, n.

[0c] But if there were no funds in the bank at the time of certification, or if the certification was fraudulent the burden is upon the plaintiff to show that he is a *bona fide* holder. Detroit National Bank *v.* Union Trust Co., 145 Mich. 656, 108 N. W. 1092, 116 Am. St. Rep. 319 (1916).

[1] Pope *v.* Bank of Albion, 57 N. Y. 126, reversing 59 Barb. (N. Y.) 226.

inherent authority to certify.[2] President also has power *ex officio* to certify ;[2a] but even though empowered to certify by a by-law, he cannot certify *his own checks,* for an agent's power is to be used for the exclusive benefit of his principal.[3] The teller has been held [4] to have authority inherent to certify, and it seems an unavoidable conclusion, as he is simply the substitute of the cashier in regard to certain duties within the scope of which this seems naturally to fall, it being his duty to pay, and certification being to all intents and purposes payment of the check. But an assistant cashier has no inherent power to certify, and a holder is put to his inquiry concerning his authority.[5]

Check Must be in Proper Form

(*a*) But the instrument certified must be a check in the usual commercial form. Where a check stated on its face that it was intended to be held as collateral security, the cashier's certification " Good when properly indorsed", was held to be irregular, and not binding.[6]

And not Dated Subsequent to Certificate

(*b*) When a post-dated check is certified before maturity, it carries notice to all that the certification was beyond the officer's authority.[7] Where a check drawn on the Bank of Albion at L.,

[2] Merchants' Bank *v.* State Bank, 10 Wall. 648, 19 L. ed. 1019. "The power is inherent in the office." Pope *v.* Bank of Albion, 59 Barb. (N. Y.) 226. Massachusetts alone has cases *contra,* and holds that a usage for cashier to certify is bad, and will not avail. Mussey *v.* Eagle Bank, 9 Met. (Mass.) 313; Atlantic Bank *v.* Merchants' Bank, 10 Gray (Mass.) 532. See Chapter XI., "The Cashier." See Muth *v.* St. Louis Trust Co., 94 Mo. App. 94, 67 S. W. 978 (1902).

[2a] Fidelity etc. Co. *v.* National Bank, 48 Tex. Civ. App. 301, 106 S. W. 782 (1907).

[3] Claflin *v.* Farmers & Mechanics' Bank, 25 N. Y. 296.

If an agent of a bank certifies a check which he issues whereby the funds of the bank may be withdrawn for his benefit, the person receiving the check, in order to give it validity, is bound to make inquiry from other officers of the bank in respect to its validity. State *v.* Miller, 47 Or. 562, 85 Pac. 81, 6 L. R. A. (N. S.) 365 (1906).

[4] Irving Bank *v.* Wetherald, 36 N. Y. 335; Farmers & Mechanics' Bank *v.* Butchers & Drovers' Bank, 16 N. Y. 133. But see Muth *v.* St. Louis Trust Co., 94 Mo. App. 94, 67 S. W. 978 (1902).

[5] Pope *v.* Bank of Albion, 57 N. Y. 127.

[6] Dorsey *v.* Abrams, 85 Pa. St. 299. See Fidelity etc. Co. *v.* National Bank, 48 Tex. Civ. App. 301, 106 S. W. 782 (1907).

[7] Clarke National Bank *v.* Bank of Albion, 52 Barb. (N. Y.) 592; Swenson Bros. Co. *v.* Commercial State Bank, 98 Neb. 702, 154 N. W.

dated March 1, was cashed by Pope in New York on March 2, the fact that the check could not have been certified after date and then have reached New York by the time Pope took it, was held to put Pope on inquiry, and prevent his recovery as a *bona fide* holder.[8]

A bank is not relieved from paying an innocent holder by the fact that the cashier transgressed his instructions to certify only in case of sufficient funds. The authority of the assistant teller to certify may be shown by a course of dealing between him and the bank and its customers.[9]

National Bank may Certify

(*c*) In Merchants' Bank *v.* State Bank the court declares that a certified check is not within the prohibition of the National Currency Act of 1864, § 23, forbidding banks to issue post-notes or "other notes" to circulate as money, other than ordinary bank-bills. The act of March 3, 1869, does not prevent national banks from certifying orally if funds are sufficient, nor from accepting conditionally to pay when the funds are sufficient.[10] That statute prohibits national banks from certifying when the funds are insufficient.

§ 414. **Effect of Certification after Issue.** — After the certification is complete, the bank is bound as a direct and original promisor to the payee; it and he are parties to a contract upon which he has his right of action directly against the bank, without any regard whatsoever to its relations with the depositor or the state of the drawer's account either at the time of, or at any time after, the acceptance.[1]

233 (1915). But see Smith *v.* Field, 19 Idaho 558, 114 Pac. 668, 1912C Ann. Cas. 354, n., holding that in such a case the bank is bound to set aside a sum sufficient to pay the check.

[8] Pope *v.* Bank of Albion, 57 N. Y. 126; Rev. 59 Barb. (N. Y.) 226.

[9] Hill *v.* National Trust Co., 108 Pa. St. 1.

[10] First National Bank *v.* Merchants' National Bank, 7 W. Va. 544.

[1] § 414. Keene *v.* Beard, 8 C. B. N. S. 372; Bullard *v.* Randall, 1 Gray (Mass.) 605; Morse *v.* Massachusetts National Bank, 1 Holmes (C. C.) 209; Cooke *v.* State National Bank of Boston, 52 N. Y. 96, affirming same case, 50 Barb. (N. Y.) 339; 1 Lans. (N. Y.) 494; and all the cases cited on this general topic, below. People *v.* St. Nicholas Bank, 77 Hun (N. Y.) 159; Blake *v.* Hamilton etc. Bank, 78 Ohio St. 189, 87 N. E. 73 (1908); Times Square Automobile Co. *v.* Rutherford National Bank, 77 N. J. L. 649, 73 Atl. 479, 134 Am. St. Rep. 811 (1909); Smith *v.* Field, 19 Idaho 558, 114 Pac. 668, 1912C Ann. Cas. 354, n.; Merchants' Bank *v.* Baird, 160 Fed. 642 (1908); Fidelity etc. Co. *v.* National

The practice of certifying checks has not escaped severe criticism; but it has been so thoroughly established, both among business men and by the courts, that its legality can no longer be questioned. The Supreme Court of the United States, per Swayne, J., speak of the custom in the following decisive language: "All the authorities, both English and American, hold that a check may be accepted, though acceptance is not usual. By the law merchant of this country, the certificate of the bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then, and shall continue good, and this agreement *is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume.* The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money. Thus it continues to perform its important functions until in the course of business it goes back to the bank for redemption, and is extinguished by payment. It cannot be doubted that the certifying bank intended these consequences, and it is liable accordingly. To hold otherwise would render these important securities only a snare and a delusion. A bank incurs no greater risk in certifying a check than in giving a certificate of deposit. In well-regulated banks the practice is at once to charge the check to the account of the drawer, to credit it in a certified check account, and, when the check is paid, to debit that account with the amount. Nothing can be simpler or safer than this process.

"The practice of certifying checks has grown out of the business needs of the country. They enable the holder to keep or convey the amount specified with safety. They enable persons not well acquainted to deal promptly with each other, and they avoid the delay and risks of receiving, counting, and passing from hand to

Bank, 48 Tex. Civ. App. 301, 106 S. W. 782 (1908); Elliott *v.* First National Bank, 105 Tex. 547, 152 S. W. 808 (1913); Bank of Ind. T. *v.* First National Bank, 109 Mo. App. 665, 83 S. W. 537 (1904); First National Bank *v.* Currie, 147 Mich. 72, 110 N. W. 499, 118 Am. St. Rep. 537, 9 L. R. A. (N. S.) 698, n. (1907); Scheffenacker *v.* Hoopes, 113 Md. 111, 77 Atl. 130, 29 L. R. A. (N. S.) 205, n. (1910).

hand large sums of money. It is computed by a competent authority, that the average daily amount of such checks in use in the city of New York, throughout the year, is not less than one hundred millions of dollars. We could hardly inflict a severer blow upon the commerce and business of the country than by throwing a doubt upon their validity." [2]

Bank Owes the Holder

(*a*) It has been said that the effect of a legal acceptance by the bank is to place the holder of the check in the position of a depositor; that in fact and in law he himself becomes thereby a depositor of the bank. It was not of course intended by this remark to signify that he stands precisely on the footing of one who has opened an ordinary deposit account with the bank. For example, he cannot draw checks against the amount standing to his credit. But, like an ordinary depositor, he is a simple contract creditor of the bank, which is bound to pay on demand to him or to his order the amount of the debt.[3] However certain it may be considered that in his character simply as a check-holder he has no right to sue the bank for the amount of his check, at least there is no doubt of his right of action after acceptance. The acceptance is in itself a new and perfect contract between himself and the bank, superseding the previous peculiar rights of all parties. It has been said that its technical operation is to transfer to the holder the drawer's right of action against the bank.[4] It is an inference from the language used in this case, that the transaction effects a literal *transferring*, in the sense of depriving the former possessor of his

[2] Merchants' Bank *v.* State Bank, 10 Wall. 604, at p. 647, 19 L. ed. 1008, 1019. See Helwege *v.* Hibernia National Bank, 28 La. Ann. 520; Blake *v.* Hamilton etc. Bank, 78 Ohio St. 189, 87 N. E. 73 (1908). See also statement of Marine National Bank *v.* City National Bank, 59 N. Y. 71; § 478, Forgery of Certified Check.

[3] Girard Bank *v.* Bank of Penn Township, 39 Pa. St. 92; Seventh National Bank *v.* Cook, 73 *id.*, 483; Milmo National Bank *v.* Cobbs, 53 Tex. Civ. App. 1, 115 S. W. 345 (1908); Fidelity etc. Co. *v.* National Bank, 48 Tex. Civ. App. 301; 106 S. W. 782 (1908); Smith *v.* Field, 19 Idaho 558, 114 Pac. 668, 1912C Ann. Cas. 354, n.; Carnegie Trust Co. *v.* First National Bank, 213 N. Y. 301, 107 N. E. 693 (1915).

The bank cannot resist payment in order to make a set-off available to its depositor. Carnegie Trust Co. *v.* First National Bank, *supra*.

[4] Commercial Bank of Albany *v.* Hughes, 17 Wend. (N. Y.) 94. The same is implied also in the decision rendered in Dykers *v.* Leather Manufacturers' Bank, 11 Paige (N. Y.) 612. People *v.* St. Nicholas Bank, 77 Hun (N. Y.) 159.

rights; that is to say that the right of action given to the holder is not coexistent with another right of action still remaining in the drawer, but is identical with it, and is by the act of the bank passed over from the one to the other.

Drawer cannot Sue Bank. He is Discharged from Liability to Holder

(*b*) The drawer can no longer sue, though the bank should finally refuse to pay the check. For he has originally only a right to demand that the check shall be duly paid on presentment, and his action lies for the damage resulting to him or to his credit from not having his debt duly discharged in the manner he has led his creditor to suppose would be sufficient.[5] But if the holder waives his right to immediate payment, by expressly asking for or even by accepting the offer of a certification by the bank, it follows that since his act acquits the debt due him from the drawer, the drawer can thereafter have no cause or basis whatsoever on which to sue. The matter is voluntarily taken out of his hands by the other parties, who make their arrangements to suit their own convenience. Even if the drawer has suggested or requested the arrangement, the assent of the payee and holder must be regarded as at his own sole risk. He is not obliged to take the bank's promise in place of the drawer's indebtedness. The promise of the bank on the drawer's account, accepted as satisfactory by the creditor, discharges the debtor,[5o] and at the same time deprives him of all further concern or possible right of action in the premises.[5a]

(*c*) In Illinois [6] and Tennessee are to be found cases in apparent conflict with the above, as to the discharge of the drawer. But in every case the fact was that the certification was obtained by the drawer before he delivered it, and, as will be shown in the next

[5] The court in Massachusetts expressly speak of the act of certification as "discharging them [the banks] as debtor to the drawer." Bullard *v.* Randall, 1 Gray (Mass.) 605.

[5o] Carnegie Trust Co. *v.* First National Bank, 213 N. Y. 301, 107 N. E. 693 (1915); First National Bank *v.* Currie, 147 Mich. 72, 110 N. W. 499, 118 Am. St. Rep. 537, 9 L. R. A. (N. S.) 698, n. (1907); First National Bank *v.* Bank of Cottage Grove, 59 Or. 388, 117 Pac. 293 (1911); Central Guarantee etc. Co. *v.* White, 206 Pa. St. 611, 56 Atl. 76 (1903); Davenport *v.* Palmer, 152 App. Div. 761 (1912), 137 N. Y. S. 796.

[5a] Continental National Bank *v.* Cornhauser, 37 Ill. App. 475; Born *v.* Bank, 123 Ind. 78, 24 N. E. 173.

[6] Bickford *v.* First National Bank of Chicago, 42 Ill. 238; Rounds *v.* Smith, *id.*, 245; Brown *v.* Leckie, 43 *id.*, 497.

section, this distinguishes the matter from the cases above and below, in which the certification was subsequent to issue.[6a] The language of the judges is much broader than their facts require or warrant, as is often the case, and, so far as they apply to the question of subsequent certification, the following arguments of Mr. Morse in his second edition seem a complete refutation, and indeed it is not at all probable that the judges of Illinois or Tennessee would hold the drawer liable after a post-issue certification, except by special agreement.

(*d*) It is said by the judges that a certified check does not differ from an ordinary check, except that the bank guarantees what otherwise would be only assumed; viz. that the check is drawn against sufficient funds, and will be honored whenever payment shall be demanded. If payment be not in fact made upon it, then the drawer is said to be still liable. The analogy of bills of exchange is relied upon, concerning which the rule is, that, if an accepted bill be not paid by the acceptor, it furnishes cause of action against the drawer. The fallacy of this argument seems perfectly obvious; the imperfection of the analogy is patent. The undertaking of the drawer of the bill is that it shall be accepted and paid according to its tenor. The undertaking of the holder of the check is that it shall be paid if duly presented for payment. If the bill be accepted only, and not paid, the undertaking of the drawer is not fulfilled, and he is liable accordingly. But if the holder of the check presents it, and, instead of demanding that payment which alone the drawer authorizes him to demand, and which alone the drawer engages shall be made, prefers or consents to accept the certification by the bank, then the holder is clearly absolved from further liability. It should be further noted, that the fact of acceptance is evidence that payment would have been made, or ought to have been made, had it been demanded at that time; for the bank has no right to certify a check unless all those circumstances exist which would make it the duty of the bank at that same moment to pay the check upon demand. It is, therefore, the holder's own fault if he takes an acceptance, when he might have a payment. Even in the possible case of a payment being demanded and refused, and certification being accepted in lieu thereof by the holder, it would seem, upon principle, that the

[6a] Since the text was written the distinction stated therein has been clearly recognized in the Illinois case of Continental National Bank *v.* Cornhauser, 37 Ill. App. 475.

drawer should be acquitted; for the holder, by accepting and entering into an arrangement not contemplated by the drawer, may be fairly held to have discharged the drawer. Take, for instance, the case of a bank, hard pushed for funds, persuading a check-holder to accept a certification in lieu of payment. The certified check, being substantially as good as money, probably will be held or will circulate for a few days before it is returned for payment. When it is returned for payment, the bank has failed. What justice would there be in holding the drawer to make good the amount, when, had payment been demanded and insisted upon, it would either have been made, or he would have been entitled to receive notice of the dishonor of his check, and so enabled to use any means in his power to protect himself? Obviously this argument would be much weakened, though not destroyed, if it were understood between the drawer and payee that certification might be accepted in lieu of payment, or if the usage of business should bind the drawer of a check to anticipate a request for certification as being as probable as a request for payment. The usage of business surely does not bind the drawer to any such anticipation. Even if it did, it would not unquestionably follow that the payee, having exercised his option to take the promise of the bank instead of money, should not be thereby concluded as against the drawer. But, in the absence of such an express or implied understanding, the argument seems to be plain against the doctrine asserted by the court of Illinois.

Drawer is Discharged

(*e*) Our view has the authority of the New York Court of Appeals, which says that, so far as the drawer of the check is concerned, certification is "precisely as if the bank had paid the money upon that check, instead of making a certificate of its being good"; also, further, that "the law will not permit a check when due to be thus presented, and the money to be left with the bank for the accommodation of the holder, without discharging the drawer." [7]

"The bank virtually says, That check is good; we have the money of the drawer here ready to pay it. We will pay it now if you will receive it. The holder says, No, I will not take the money; you may certify the check and retain the money for me until this check is presented. The law will not permit a check,

[7] First National Bank of Jersey City *v.* Leach, 52 N. Y. 350.

when due, to be thus presented, and the money to be left with the bank for the accommodation of the holder without discharging the drawer. The money being due and the check presented, it is his own fault if the holder declines to receive the pay, and for his own convenience has the money appropriated to that check subject to its future presentment at any time within the Statute of Limitations." [8]

Equal to Certificate of Deposit

"Ordinarily, where the payee or holder of a check which is payable immediately, instead of demanding payment, procures the check to be certified, the check is, as between the drawer and holder, regarded as paid, and the holder must look to the bank whose obligation it has accepted in lieu of the money; because, by procuring the certification, he has caused an amount of the drawer's fund, or credit, equal to that for which the check was drawn, to be set apart for the payment of that check and withdrawn from the control of the drawer,[8a] and his funds are as effectually diminished as if the money had been paid; [8b] while the bank has given a negotiable obligation to the holder of the check which is equivalent to a certificate of deposit.[8c] If the holder of the certified check should lose it, he would still have his remedy upon it against the bank, but could not have recourse against the drawer whose funds had been locked up, or transferred to the credit of another party. And even the subsequent payment of the check by the bank upon a forged indorsement would not relieve it of its liability upon the contract it had made with the true owner, nor

[8] First National Bank *v.* Leach, 52 N. Y. 353.

The drawer is not discharged when he procures the certification and the payee does not assent thereto. Cullinan *v.* Union Surety etc. Co., 79 App. Div. 409 (1903), 80 N. Y. S. 58.

[8a] The drawer would have no authority to revoke payment. Blake *v.* Hamilton etc. Bank, 79 Ohio St. 189, 87 N. E. 73 (1908).

[8b] Central Guarantee etc. Co. *v.* White, 206 Pa. St. 611, 56 Atl. 76 (1903); First National Bank *v.* Currie, 147 Mich. 110 N. W. 499, 118 Am. St. Rep. 537, 9 L. R. A. (N. S.) 698, n. (1907).

[8c] Smith *v.* Field, 19 Idaho 558, 114 Pac. 668, 1912C Ann. Cas. 354, n.; Scheffenacker *v.* Hoopes, 113 Md. 111, 77 Atl. 130, 29 L. R. A. (N. S.) 205, n. (1910).

A certification of a check is equivalent to its acceptance. Meuer *v.* Phenix National Bank, 87 App. Div. 281 (1903); *id.*, 94 App. Div. 331 (1904), 88 N. Y. S. 83, affirmed in 183 N. Y. 551, 76 N. E. 1100. Smith *v.* Field, 19 Idaho 558, 114 Pac. 668, 1912C Ann. Cas. 354, n. But an acceptance is not equivalent to a certification. Milmo National Bank *v.* Cobbs, 53 Tex. Civ. App. 1, 115 S. W. 345 (1908).

restore to the drawer the right to draw upon the bank for the funds which had been appropriated to the payment of the check and were consequently no longer his." [9]

Certified Check Stolen

Where a certified check is stolen, and notice is given of its loss, or the check is advertised, still a *bona fide* holder can recover upon it from the bank.[10]

(*f*) Chief Justice Oakley said: "When the business of the bank is properly conducted, it is the duty of the officer certifying the check to cause it to be immediately charged as paid to the account of the drawer; and when this is done, the sum thus charged will remain as a deposit in the bank to the credit of the check, and be forever withdrawn from the control of the maker, except as a holder of the check. Such a deposit stands upon exactly the same grounds as any other," [11] except of course the check-holder cannot draw against it in parts. A certified check has a distinctive character, as a species of commercial paper, the certification constituting a new contract between the holder and the certifying bank; the funds of the drawer are, in legal contemplation, withdrawn from his credit, and appropriated to the payment of the check, and the bank becomes the debtor of the holder, as for money had and received.[12] As to the drawer and indorsers, if there are any, the certification is a payment of the check, and they are no longer liable upon it.[12]

(*g*) A California case is, by analogy, authority to the same effect; wherein it was held that the payee, having presented the check for payment, which was offered, but having then decided to leave the money in the bank for his own convenience a few hours longer, the drawer was discharged, though upon the second demand for payment, made by the payee on the same day, payment was refused by reason of the failure of the bank.[13]

[9] Thomson *v.* Bank, 82 N. Y. 6.

[10] Nolan *v.* Bank, 67 Barb. (N. Y.) 24.

[11] Willetts *v.* Phœnix Bank, 2 Duer (N. Y.) 121.

[12] National Commercial Bank *v.* Miller, 77 Ala. 168; Merchants' Bank *v.* Baird, 160 Fed. 642 (1908); First National Bank *v.* Currie, 147 Mich. 72, 110 N. W. 499, 118 Am. St. Rep. 537, 9 L. R. A. (N. S.) 698, n. (1907).

[13] Simpson *v.* Pacific Mutual Life Ins. Co., 44 Cal. 139.

Check Becomes a Promise to Pay

By the acceptance or certification of the check, a new and specific engagement is entered into by the bank with the holder and his legal transferees. This engagement is simply and unconditionally to pay to him or them the sum named in the check on demand.[14] The check ceases in fact to be a check, and becomes a promise to pay. Accordingly, the rules which govern a check no longer govern this instrument.

"There is no difference between the liability created by a certified check and by a note of the bank payable on demand. Each is intended to circulate as money. The object is to enable the holder to use the check as money. By certifying, the bank meant to give the check a currency and value that would not otherwise belong to it, and this additional value can only be given by holding the certificate to be an unconditional promise of payment." [15]

What Certification Admits

(*h*) Certification admits the genuineness of the drawer's signature, and the fact that there are sufficient funds.[16] The rule has been laid down in New York and Pennsylvania, that by the act of

[14] Girard Bank *v.* Bank of Penn Township, 39 Pa. St. 92; Farmers & Mechanics' Bank *v.* Butchers & Drovers' Bank, 4 Duer (N. Y.) 219; 16 N. Y. 125; Meads *v.* Merchants' Bank of Albany, 25 N. Y. 143; Sharswood's note to Byles on Bills, p. 21 (Sharswood's ed.); Barnes *v.* Ontario Bank, 19 N. Y. 152; Bickford *v.* First National Bank of Chicago, 42 Ill. 238; First National Bank *v.* Currie, 147 Mich. 72, 110 N. W. 499, 118 Am. St. Rep. 537, 9 L. R. A. (N. S.) 698, n. (1907); State *v.* Miller, 47 Or. 562, 85 Pac. 81 (1906); Meuer *v.* Phenix National Bank, 94 App. Div. 331 (1904), 88 N. Y. S. 83.

[15] In substance, Bickford *v.* First National Bank, 42 Ill. 243.

[16] Merchants' Bank *v.* State Bank, 10 Wall. 604, 19 L. ed. 1008; Espy *v.* Bank, 18 Wall. 604, 21 L. ed. 947; Phœnix Bank *v.* Bank of America, 1 N. Y. Leg. Obs. 26; Marine National Bank *v.* National City Bank, 59 N. Y. 77; Rapp *v.* National Bank, 136 Pa. St. 426, 20 Atl. 508; Milmo National Bank *v.* Cobbs, 53 Tex. Civ. App. 1, 115 S. W. 345 (1908); Continental National Bank *v.* Metropolitan National Bank, 107 Ill. App. 455 (1903); Bank of Ind. T. *v.* First National Bank, 109 Mo. App. 665, 83 S. W. 537 (1904); Blake *v.* Hamilton etc. Bank, 79 Ohio St. 189, 87 N. E. 73 (1908); Jackson Paper Mfg. Co. *v.* Commercial National Bank, 199 Ill. 151, 65 N. E. 136, 93 Am. St. Rep. 113, 59 L. R. A. 657 (1902); Robinett *v.* Willow Springs Bank, 178 Mo. App. 422, 163 S. W. 248 (1914); Security State Bank *v.* Brantford State Bank, 31 N. D. 460, 154 N. W. 284 (1915); First National Bank *v.* Ravenswood Bank, 141 Ky. 671, 133 S. W. 581 (1911); First National Bank *v.* Union Trust Co., 158 Mich. 94, 122 N. W. 547, 133 Am. St. Rep. 362 (1909).

certification the bank undertakes for only two facts; viz., the genuineness of the drawer's signature, and the sufficiency of his account to meet this demand; that it vouches for nothing further, either in the body of the check or indorsed upon it.[17] The Supreme Court of the United States has adopted the same principle in the case of a check only verbally declared to be good, in response to the payee's inquiry put to the teller; but at the same time admitted that there might be some doubt as to extending the rule to cover a case where the bank had certified the check in writing, and so sent it forth upon the market to circulate virtually like money or a certificate of deposit.[18]

Evidence of Usage

(*i*) No evidence of usage among banks and merchants to regard certification as an obligation to pay although the body of the instrument is forged, will be admitted.[19] But in Louisiana a bank was not allowed to recover money paid upon a check raised before certification.[20]

Bank must not Cause Damage by Failure to Disclose the Facts in its Possession to an Inquirer

(*j*) But the ordinary rules limiting the warrant of a certification to signature and funds only apply when the bank has no knowledge of the history of the instrument, and of the facts connected with the drawing, delivery, indorsement, etc. When a certified check is presented for information, if the bank possesses special knowledge it is under the same obligation to disclose it as a natural person, when omission would cause injury to the applicant, who evidently intends to act on the reply of the bank.[21]

The F. Bank certified a draft payable there. T., a holder for value, paid the draft to the F. in settlement of a balance, but the F. refused it, saying that the C. Bank, which had presented the draft for certification, was then and had been for several days owing the F., and was insolvent. *Held,* that the F. was bound to

[17] Marine National Bank *v.* National City Bank, 59 N. Y. 67, stated *post;* Rapp *v.* National Bank, 136 Pa. St. 426. See Continental National Bank *v.* Tradesmen's National Bank, 173 N. Y. 272, 65 N. E. 1108 (1903).

[18] Espy *v.* Bank of Cincinnati, 18 Wall. 604, 21 L. ed. 947.

[19] Security Bank *v.* National Bank, 67 N. Y. 458.

[20] Louisiana National Bank *v.* Citizens' Bank, 28 La. Ann. 189.

[21] Clews *v.* Bank of New York National Banking Association, 89 N. Y. 418.

receive the certified draft.[22] But in the Court of Appeals it was held that T. was not a holder without notice. The facts were, that by custom of the banks of Rochester negotiable paper held by a bank payable at another is certified, and returned as an item of credit in its exchange account, and not as a negotiable instrument. On December 19, the C. Bank received from the F. Bank a certified draft for $800, which by custom the C. was entitled to have credited in its exchange settlement with the plaintiff on the following morning. The same day C. transferred said draft to the defendant in settlement of its exchange account with the latter. December 20, there was a balance due, after deducting the $800 draft, in favor of the plaintiff against the C., which was then insolvent. In settling the account between plaintiff and defendant, defendant claimed credit for the draft. It appeared that defendant at time of receiving draft knew there was an exchange account between the plaintiff and the C. Bank, and *had notice that the certification was not for purposes of negotiation*, but only as a voucher, and so was not a holder for value without notice; for the defendant did have notice that the draft had been perverted from the purposes for which it was certified. *Held*, that such receipt of the draft by defendant did not entitle it to the rights of negotiable paper, and that under the circumstances defendant could not set off such draft against plaintiff's exchange account.

Drawer Discharged

(*k*) Acceptance of certification of a check instead of payment releases the drawer, and renders the collecting bank responsible to the owner for the amount. The law presumes damages to the owner; and this whether or not the bank on which the check was drawn has the funds to pay it when presented.[23]

(*l*) It is clear, in any way we look at the question, that the drawer is discharged by certification after issue. Suppose the bank becomes insolvent, it is clearly unjust to hold the drawer when the

[22] Flour City National Bank *v.* Traders' National Bank, 35 Hun (N. Y.) 241, 105 N. Y. 550, 12 N. E. 55 (1887).

[23] Essex County National Bank *v.* Bank of Montreal, 7 Biss. 193 (1876); Continental National Bank *v.* Cornhauser, 37 Ill. App. 475; Times Square Automobile Co. *v.* Rutherford National Bank, 77 N. J. L. 649, 73 Atl. 479, 134 Am. St. Rep. 811 (1909); First National Bank *v.* Currie, 147 Mich. 72, 110 N. W. 499, 118 Am. St. Rep. 537, 9 L. R. A. (N. S.) 698, n. (1907); Scheffenacker *v.* Hoopes, 113 Md. 111, 77 Atl. 130, 29 L. R. A. (N. S.) 205, n. (1910).

payee could have had the money and chose to leave it and take the certification; and besides, the ordinary rule of delay in presentment for payment would discharge the drawer. If, on the other hand, the bank is solvent, where is the use of two actions, one by the holder against the drawer, and another by the drawer against the bank, when a single action against the bank by the holder will accomplish full justice?

It will not do to say that a check is a bill of exchange, and therefore the holder can sue the drawer if it is dishonored after acceptance. The same argument would prove that a check could be presented a day later by collecting through a banker than by direct collection, and that the drawer of a check is absolutely discharged by laches. Such reasoning would convince us of almost anything; for example, as a man is an animal, he must have four legs, since other animals have.

(*m*) The certification of a check will not give the holder a preference over other creditors upon insolvency of the bank.[24]

§ 415. **Certification before Issue does not at once discharge the Drawer.**[1] — Until the certified check is issued, the fund cannot be withdrawn from the reach of a garnishee or attachment against the depositor.[2] If it were otherwise, a depositor could cut off completely all rights of attachment by making out checks to cover his deposit and retaining them in his possession. It is clear that the control and ownership of the deposit are still in the drawer until the check is issued, and that an attachment against it before the check comes into the hands of a *bona fide* holder will secure the funds. Of course, then, when a holder receives a check from the drawer certified before delivery, the drawer's liability to the holder cannot cease until the bank has been properly notified of the issue of the check.

It will doubtless be held, whenever the question arises, that a check certified before delivery from the drawer is taken on the faith

[24] People *v.* St. Nicholas Bank, 77 Hun (N. Y.) 159.

[1] § 415. First National Bank *v.* Leach, 52 N. Y. 350; Essex National Bank *v.* Bank of Montreal, 7 Biss. 193; Times Square Automobile Co. *v.* Rutherford National Bank, 77 N. J. L. 649, 73 Atl. 479, 134 Am. St. Rep. 811 (1909); Blake *v.* Hamilton Dime Sav. Bank, 79 Ohio St. 189, 87 N. E. 73, 128 Am. St. Rep. 684, n., 20 L. R. A. (N. S.) 290 (1908); Davenport *v.* Palmer, 152 App. Div. 761 (1912), 137 N. Y. S. 796. Daniel on Neg. Inst., § 1601.

[2] Gibson *v.* National Park Bank, 98 N. Y. 87; Born *v.* Bank, 123 Ind. 78, 24 N. E. 173; Continental National Bank *v.* Cornhauser, 37 Ill. App. 475; Oyster and Fish Co. *v.* Bank, 51 Ohio St. 106.

of the drawer until notice to the bank, or its acknowledgment of the correctness of the acceptance and its continued liability upon it.

These distinctions, we think, will disclose the real force of the Illinois cases. In them the certification was before delivery, and upon the facts the decision was perfectly just and proper, although the language of the judges was broader than the truth, and the judgment was filigreed with false ornament.

Suppose again that the drawer has his check certified, and afterward issues it to H., but before the issue, or before H. can with reasonable diligence present the check for payment, the bank fails;[3] it is probable that in such case the drawer would not be held to be released by any court. The case differs from those in which the drawer is held discharged, in the essential point, that

[3] A decision by Judge Walker, in the latter part of 1887, in the case of the First National Bank *v.* Born, presents the point made in the text. On Saturday, Born drew a check on Ritzinger's Bank in favor of the First National Bank, and had it certified. Afterward at three o'clock (close of banking hours) he delivered the check to the First National Bank, in payment of a collection held by it against him. On Monday the payee presented the check to Ritzinger's Bank, and demanded payment. Payment was refused, Ritzinger's Bank having closed its doors on the preceding Saturday, and never opened them after that day. Born was duly notified. After thorough consideration, the court held that the drawer was not discharged.

In every case where that effect followed certification, it was clear upon the facts that any other rule would have enabled the *holder* by his own sole act to enlarge the drawer's liability. In every such case the holder could have obtained the money, but by his own wish and act, and without the consent or agreement of the drawer, chose to have the check certified. But when the drawer himself secures the certification, the case is different.

The holder of a check ought to have time to get to the bank, and an opportunity to receive his money before he can be said to have done an act to discharge the party giving him the order. "Besides, it is not true that the drawer of the check so certified has put the money beyond his control or recovery by legal means" (this was the argument of counsel). "It is only when the holder is not the drawer that such is the case. The money is thus appropriated, not to pay any particular person, but to pay a particular check. So the drawer can get it certified and carry it as long as he wants to, and return it to the bank, present it like any other holder, and receive his money, or sue to recover it."

Checks certified before delivery do not lose, as to the drawer, any of the characteristics of uncertified checks. "Nor do they impose any greater diligence upon the holder, who has the same time in which to present them as if they were uncertified. The only effect of the certification is to give the check additional currency by carrying with it the evidence that it was drawn in good faith on funds sufficient to meet its payment, and lending to it the credit of the bank in addition to the credit of the drawer."

the holder could have received the money, but chose to leave it in the bank, making the transaction equivalent to payment and subsequent deposit. Here the holder never had the opportunity of receiving the cash; he took the paper just as he would take the note of a third person; if properly presented and the maker was insolvent, the indorser would have to make the amount good; but if properly presented and the maker said he could have the money and the holder said no, he would leave it with the maker, then surely, whether the paper be note, check, bill, or what not, the indorser or drawer would have nothing to do with the matter thereafter. And the case also differs from that of payment in bank bills, for here the paper carries on its face proof as to *who* is liable, if any one is, while an equal certainty cannot be attained in the case of bank bills without embarrassing commerce.

Indorsee of Certified Check Holds Indorser

The drawer who has a check certified before delivery stands in the same position as an indorser of a certified check, and it is settled that such indorser can be held by the indorsee.[4]

In Tennessee we have a decision, in 1872, that the drawer who has a check certified before delivery is liable to the holder, as well as the bank. (§ 416.) And though the language is sweeping, it should be limited, both in this and in the Illinois cases, to the facts present to the mind of the judge.

§ 416. **Presentment to hold Drawer.** — To render the drawer liable on a check that has been certified (before issue), the holder must present it within the business hours of the day following its receipt. "We have been referred to no authority, nor are we aware of any, in which it is held that the fact of certification of a check either discharges the drawer absolutely from liability to the holder, or changes the law of demand and notice which governs the relation between the holder and drawer. . . . It is no doubt true that the credit of the check may rest mainly on the fact that the bank is primarily liable, but it is made stronger by the fact that the drawer stands as surety for the bank. . . . It is still a check, and because of its certification and thereby of the bank's promise to pay it, its approximation to money and its negotiability in market are increased." [1]

[4] Mutual Bank *v.* Rotge, 28 La. Ann. 933.

[1] § 416. Andrews *v.* German National Bank, 9 Heisk. (Tenn.) 211 (1872); Schoolfield *v.* Moon, 9 Heisk. (Tenn.) 171. But see below.

Drawer Discharged Doubly

A check was presented four years after certification, and payment refused. The court held the bank bound to pay without regard to the drawer's account, and that the drawer was discharged from liability both on the check and on the original consideration.[2]

§ 417. **Attachment of Deposit that is covered by Certified Check.** — A railroad company obtained from a bank a certified check for the amount of its deposit, payable to the order of its treasurer, and, while it was outstanding, a creditor of the company in a suit against the company served a warrant of attachment upon the bank. The company's treasurer afterwards deposited the check to his individual account, and drew against it from time to time to pay the debts of the company. The bank had reason to believe that the check was owned by the company, and that the money was used to pay its debts, as was really the case. It was therefore held that the bank was liable for allowing the funds belonging to the company to escape from the grip of the attachment.[1]

§ 418. **The Statute of Limitations.** — The Statute of Limitations only begins to run against the liability of the bank at the time when demand for payment is made.[1] The rule is thus laid down in the case cited, but it is probable that if any tribunal inclined to hold, in the case of any ordinary deposit account, that the statute began to run in favor of the bank from the date of the last transaction between it and the depositor, analogy would lead the same bench to declare that the statute would begin to run against the holder of a certified or accepted check from the date of the bank's promise upon it. This may be directly inferred also from the language of the court in the case of the Farmers and Mechanics' Bank *v.* Butchers and Drovers' Bank, cited below. The check itself is, in its new form, strictly "evidence of a deposit to the credit of the holder." [2] All the rules about presentment for payment at once fall to the ground. The holder need no longer regard the condition of the drawer's account or balance with the bank. The bank is bound to withhold enough from the depositor's funds to meet the demand of the holder whenever it may be made.

[2] French *v.* Irwin, 4 Baxter (Tenn.) 401 (1874).

[1] § 417. Gibson *v.* National Park Bank, 98 N. Y. 87. See *contra*, Bills *v.* National Park Bank, 47 N. Y. Superior Court 302.

[1] § 418. Girard Bank *v.* Bank of Penn Township, 39 Pa. St. 92.

[2] Farmers & Mechanics' Bank *v.* Butchers & Drovers' Bank, 4 Duer (N. Y.) 219; 16 N. Y. 125.

No lapse of time before making the demand, unless it should be held that the Statute of Limitations had run, is laches upon the part of the holder, or infringes his rights against the bank on the bank's duty towards him. If in the interval, no matter how long it be, the bank has allowed the drawer by his checks or otherwise to reduce his balance, or even wholly to withdraw it, yet the bank remains primarily liable on its original contract. It must make up any deficit from its own funds. Even if at the time of acceptance there were not funds of the drawer sufficient to meet the check, the bank must still keep its promise. Delay of two months and withdrawal of the drawer's funds in the interval,[3] and again delay of one year,[4] were held not to impair at all the liability of the bank. Far the strongest case that has arisen is that of the Girard Bank *v.* Bank of Penn Township,[5] where the check was certified Oct. 7, 1852; the drawer's funds were not drawn out until Oct. 10, 1854; and the check was not presented for payment till Sept. 3, 1859. But the period of the Statute of Limitations had not elapsed since the certification, even if it could have begun to run at all prior to the demand, and the court did not hesitate to hold the bank liable.

Form. Usage must Govern

This doctrine seems simple enough. Yet the number of cases in which it has been questioned by counsel, and reiterated by the court, intimates a lurking belief in the existence of some theory which runs counter to it, and which is sufficiently sound to expect judicial support. This is doubtless to be sought in the form or phraseology by which it is customary for the bank to accept or certify the check. This is not ordinarily done by writing any distinct words indicative in terms of a promise or undertaking to pay, but simply by writing on the check, in the handwriting of the officer competent to enter into the contract on behalf of the bank, the word "Good." Sometimes the officer adds to this his own initials. Sometimes he writes his own name or initials without anything more. Other methods may be in use in various places. In England, until a statute was lately passed requiring words importing a distinct promise to be written and signed, a simple mark, not being a word at all, or otherwise intrinsically intelligible,

[3] Willetts *v.* The Phœnix Bank, 2 Duer (N. Y.) 121.

[4] Farmers & Mechanics' Bank *v.* Butchers & Drovers' Bank, 4 Duer (N. Y.) 219; 16 N. Y. 125.

[5] 39 Pa. St. 92.

was often placed upon the checks.[6] They are called in the English cases "marked checks." It seemed therefore not wholly inapt to argue that these words, initials, or marks, at the very most, purported only to be memoranda or notes showing the presentment of the check, and the fact that at the time of presentment no obstacle stood in the way of payment by the bank. In other words, they signified that at that time the drawer's balance was good for the amount of the check. They conveyed information, but not a promise. More meaning, it was considered, could not be introduced into them; they certainly did not state a promise, and it was too much to let unintelligible letters or words create a binding obligation to pay large sums of money, for which no consideration from the promisee had ever been received by the promisor. Neither could they be wrenched into promising that the bank would continue to keep the drawer's balance good for this amount, for the sole benefit of this holder, for any indefinite period that he might choose to keep the check out. To these arguments the only answer was that the words, initials, or marks were to be construed by the light of the well-known usage of business; and being thus construed there could be no question that they were designed, and were always clearly understood by all parties concerned, to be a perfected contract on the part of the bank. It was not pretended that they were written without any object whatsoever, that they meant absolutely nothing. Yet among them all the word "Good" was the only word or mark which could possibly have any independent meaning; and of that the meaning was doubtful. Since, therefore, extrinsic facts and banking usage must be introduced to explain them, why not let it really and thoroughly explain them, and not merely go through a false pretence of doing so? They were a brief symbol, well understood by all the business world to signify, and ordinarily accepted as identical with, an elaborate promise. The argument in favor of the banks was only plausible; the reply was incontrovertible.[7] "The bank, instead of being prejudiced, is benefited by the delay of its owner in calling for its payment, and can with no more propriety impute laches to the unknown holder of the check than to a known holder of an ordinary deposit. . . . There is in reality, in good sense, no distinction in

[6] Grant on Bankers and Banking, p. 56 *et seq.*, and cases cited; especially Robson *v.* Bennett, 2 Taunt. 388; Stevens *v.* Hill, 5 Esp. 247. For the present law in England, see Dufaur *v.* Oxenden, 1 M. & Rob. 90. Corlett *v.* Conway, 5 M. & W. 655.

[7] Willetts *v.* The Phœnix Bank, 2 Duer (N. Y.) 121.

the nature of the liability created between a certified check and the note of the bank payable on demand. Each is intended to circulate as money, each is an absolute promise to pay a specific sum upon demand, and laches in making the demand is no more imputable in the one case than in the other." [8]

§ 419. **Certification by Mistake.** — If the check has come to a *bona fide* holder since the certification, or the holder would be prejudiced by the bank's recovery on account of its mistake, the bank is estopped from such recovery; but a mistaken certification can be corrected before loss to an innocent party has occurred in consequence of it.[1] If the bank certifies the check by mistake, under the erroneous impression that it has sufficient funds of the drawer to apply upon it, and if the discovery is made with reasonable promptitude and immediately notified to the holder; if the check itself still remains in the hands of the party who presented it for certification, and if his position is precisely the same after the revocation that it would have been had the bank originally refused acceptance; if he has not lost his opportunity to charge indorsers; if he has parted with no collateral security, has released no sureties, has not had his power of collection from the drawer of the check diminished by any intermediate occurrence, — then it seems that it is not too late for the bank still to undo its mistake.[2] If the mistake plus its revocation would prejudice an innocent party, there can be no recovery, but if the circumstances are such that all innocent parties are in the same position as if the bank had refused to certify at first then it may be revoked.

[8] *Ibid.* 132.

[1] § 419. Bank *v.* Baxter, 31 Vt. 101; Second National Bank *v.* West National Bank, 51 Md. 128; Bowen *v.* Needles National Bank, 87 Fed. 430 (1898); National Bank *v.* Miner, 167 Cal. 532, 142 Pac. 670 (1914). See Security Savings etc. Co. *v.* King, 69 Or. 228, 138 Pac. 465 (1914); Inter-State National Bank *v.* Ringo, 72 Kan. 116, 83 Pac. 119, 115 Am. St. Rep. 176, 3 L. R. A. (N. S.) 1179, n. (1905); Baldinger etc. Mfg. Co. *v.* Manufacturers'-Citizens' Trust Co., 156 N. Y. S. 445 (1915); Union Trust Co. *v.* Preston National Bank, 136 Mich. 460, 99 N. W. 399, 162 Am. St. Rep. 370 (1904) where there were no funds in the bank at the time of the certification, and the statute made such certification a crime; First National Bank *v.* Union Trust Co., 158 Mich. 94, 122 N. W. 547, 133 Am. St. Rep. 362 (1909) holding that the payee of a check who procures its certification with notice of facts making the certification dishonest.

[2] Irving Bank *v.* Wetherald, 36 N. Y. 335. See also Watervliet Bank *v.* White, 1 Den. (N. Y.) 608; Brooklyn Trust Co. *v.* Toler, 65 Hun (N. Y.) 187; Mt. Morris Bank *v.* Twenty-third Ward Bank, 172 N. Y. 344, 64 N. E. 810 (1902).

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